

Justice in Criminal Liability: Decriminalizing Harmless Attempts

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I. INTRODUCTION

Among theories of criminal liability, two are polar opposites. On one theory, or more accurately family of theories, society's license to punish the offender derives from her dangerousness or wickedness.¹ On pure versions of these theories wicked thoughts and plans unaccompanied by concrete acts fail to be punishable only because the trier of fact would have insufficient evidence to infer the appropriate level of personal dangerousness or depravity. Such theories are "subjective."

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¹ Dangerousness and wickedness are, of course, two different things. One may be wicked for a discrete period of time without being the least bit dangerous after that time. Indeed, one may be subjectively wicked and do things with the wickedest possible intent without being dangerous at *that* time, if one's choice of means is incurably defective. The wickedness version of subjectivism appeals to those theorists who have some inclination towards retributivism. I take no exception to the claim that the wickedness of conduct is properly a matter to be taken into account in assessing criminal liability. Intentional murder is a more serious offense than criminally negligent homicide. Where the depravity theory goes wrong is in taking wicked conduct to be a sufficient predicate for liability—even if that conduct violates no one's rights.

The dangerousness version of the subjective theory is, I contend, further off the mark. Dangerousness is neither a sufficient nor a necessary condition of liability. Indeed what crime one is guilty of ought never to be a function of how dangerous one is. Dangerousness ought enter in only at the punishment phase, and then under strict constraints. Dangerousness versions of the subjective theory of criminal liability are, however, quite popular among those of utilitarian bent. And conscious or unconscious utilitarians are in an overwhelming majority among criminal law commentators and criminal justice policy makers.

On the opposite theory, society's license to punish the offender derives from her commission of criminal acts that actually impose upon society.² In the absence of these acts, we cannot justly punish the offender even if we know with certainty that she is desperately wicked and dreadfully dangerous. This is sometimes called an "objective" theory, but because that label can cover a great deal of ground, I will refer to this theory, which I endorse, by the more descriptive if less elegant phrase "imposition theory."

A theory is not "subjective" in the sense I have in mind merely because the mental state of the offender is an element of liability. In that weak sense we are all subjectivists—so long as we recognize the propriety of distinguishing among different degrees of homicide in terms of mental states. For the purposes of this Article a theory is "purely subjective" if an act is not a necessary condition of liability, and it is "subjective" if, for at least some offenses, an imposition upon discrete victims or society is not a necessary condition of liability.

I doubt that there is anyone who holds a pure version of a subjective theory. A purist would insist that the criminal act is *only* of evidentiary significance. In principle a machine that perfectly assessed subjective depravity or predicted future criminality could substitute for the criminal act as the predicate for criminal liability. Some may eschew this extreme view only because they believe such a machine to be impossible. Most would, I hope, concede that such a machine, even if it were possible, ought not be used for reasons of justice. In the end, this concession will take the modern subjectivist further than he may have anticipated. My present purpose, however, is only to avoid seeming to overstate my opponents' initial commitments.

Still, if there may be no "pure" subjectivists, the criminal justice community has taken on board a very heavy load of subjectivism. The Model Penal Code, for example, although it purports to forbid "conduct that unjustifiably and inexcusably inflicts or threatens substantial harm," apparently sees as the purpose of punishment "to subject to public control persons whose conduct indicates that they are disposed to commit crimes."³ Correspondingly, the official commentators concluded that "the primary purpose of punishing attempts is to neutralize dangerous individuals and not to deter dangerous acts."⁴ The "substantial step" towards completion of the crime required by the

² See, e.g., 1 EDWARD LIVINGSTON, *THE COMPLETE WORKS OF EDWARD LIVINGSTON ON CRIMINAL JURISPRUDENCE* 235 (1873); Paul H. Robinson, *A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability*, 23 UCLA L. REV. 266 (1975). Both Livingston and Robinson dilute their objectivism by understanding all attempts to create social injuries. LIVINGSTON, *supra* at 19; Robinson, *supra* at 269–71; see also *infra* note 22.

³ MODEL PENAL CODE § 1.02 (1)(a), (b) (1985).

⁴ MODEL PENAL CODE § 5.01, Comment at 323 (1985); see also WAYNE R. LA FAVE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* 506 (2d ed. 1986); GLANVILLE

Model Penal Code is satisfied by "anything which, under the circumstances as [the defendant] believes them to be, is an act or omission constituting a substantial step" ⁵

Commentators are so nearly unanimous that the key to criminal liability ought to be the dangerousness or depravity of the offender, rather than the extent of his actual imposition upon his victim or society, that this subjective theory is sometimes simply called the "modern" theory ⁶

Proponents of subjective theories argue that it is irrational to take into account whether an act actually imposed upon anyone.⁷ An offender may demonstrate his dangerousness or depravity beyond any doubt without such imposition, and it would defeat the purposes of the criminal law not to hold such a one liable. The imposition theorist responds that, however much liability might prove socially useful, it would be fundamentally unjust. Because this is the central dispute, crimes of attempt form a natural field of battle between subjective theories and the imposition theory

I want to emphasize, however, that what is at stake here is not simply a matter of theories of attempts, though harmless attempts—attempts that impose no risk—focus the dispute in a particularly sharp way. What is at stake is the general theory of criminal liability. Subjective theories and the imposition theory are fundamentally different ways of understanding what it is for conduct to be criminal. The imposition theory has its roots in retributive justice. Those of the subjective theories are primarily in utilitarianism.

The objective theory has differing consequences from subjective theories throughout the substantive criminal law including for such matters as punishment theory, victimless crimes, felony-murder, misdemeanor-manslaughter, conspiracy, possession offenses, and even criminal causation. Except for a brief excursion into punishment theory, this article ignores these other matters to concentrate on the pivotal test case of attempts. My hope is thereby to show that there is some plausibility, after all, to an approach that has been all but universally rejected by academic commentators.

Hart puts forcefully the subjectivist complaint against an imposition requirement:

WILLIAMS, CRIMINAL LAW: THE GENERAL PART 632 (2d ed. 1961); Donald Stuart, *The Actus Reus in Attempts*, 1970 CRIM. L. REV. 505, 508.

⁵ MODEL PENAL CODE § 5.01(1)(c) (1985); cf. [English] Criminal Attempts Act, 1981 Pt. I, § 1, ¶3 ("In any case where—(a) apart from this subsection a person's intention would not be regarded as having amounted to an intent to commit an offence; but (b) if the facts of the case had been as he believed them to be, his intention would be so regarded, then, he shall be regarded as having had an intent to commit that offence.").

⁶ See, e.g., LAFAVE & SCOTT, *supra* note 4, at 510.

⁷ Stephen J. Schulhofer, *Attempt*, 1 ENCYCLOPEDIA OF CRIME AND JUSTICE 97 (Sanford H. Kadish ed. 1983).

The almost universal tendency in punishing to discriminate between attempts and completed crimes rests, I think, on a version of the retributive theory which has permeated certain branches of English law, and yet has on occasion been stigmatized even by English judges as illogical. To many people such a theory of punishment seems to confuse punishment with compensation, the amount of which should indeed be fixed in relation to harm done. Even if punishment and compensation were not distinguished in primitive law, many think that this is no excuse for confusing them now. Why should the accidental fact that an intended harmful outcome has not occurred be a ground for punishing less a criminal who may be equally dangerous and equally wicked?⁸

Even those who question subjective theories sometimes cede them the high ground of rationality. For example, Fletcher defends taking imposition into account in the following somewhat defensive way:

Modernists hold to arguments of rational and meaningful punishment. Despite what we might feel, the modernist insists, reason demands that we limit the criminal law to those factors that are within the control of the actor. The occurrence of harm is beyond his control and therefore ought not to have weight in the definition of crime and fitting punishment.⁹

Fletcher continues by stating:

The relevance of the victim's suffering in the criminal law poses a serious hurdle to the struggle for reasoned principles in the law. Generations of theorists have sought to explain why we punish actual homicide more severely than attempted homicide, the real spilling of blood more severely than the unrealized intent to do so. Our combined philosophical work has yet to generate a satisfactory account of why the realization of harm aggravates the penalty. Yet the practice persists in every legal system of the Western world. We cannot adequately explain why harm matters, but matter it does.¹⁰

Despite Fletcher's misgivings, I submit that there is nothing mysterious or terribly difficult about an imposition theory. It resonates with considerations that have long been staples of the jurisprudence of crime and punishment—legality, responsibility, autonomy, and “proportionality.” There is surely some initial plausibility to the proposition that free people should not become criminally liable unless they trespass upon someone else's moral space, that is unless they impose in some way. Similarly, there is at least some intuitive support for the further proposition that free people ought not to acquire liability for serious crimes unless they have imposed in some serious way. The common

⁸ H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 129-31 (1968).

⁹ GEORGE P. FLETCHER, A CRIME OF SELF-DEFENSE 64 (1988).

¹⁰ *Id.* at 82-83.

sense appeal of the imposition theory is reflected in the old common law, for which there was no criminal liability for any unsuccessful attempt.¹¹

It will be the burden of the first half of this article to argue that the imposition theory's initial plausibility is, in fact, well founded. In large part I do this through arguing against subjective theories. Of course every argument against the class of subjective theories is simultaneously an argument for the imposition theory and *vice versa* inasmuch as I have defined the two to be mutually exclusive and jointly exhaustive. Everyone who rejects the requirement of an imposition for liability, and a sufficiently objective imposition at that, I stuff together into the subjectivist pigeonhole.

In fact, despite the obviousness of the imposition theory, I have identified no contemporary commentator who escapes consignment to the subjectivist pigeonhole. That is not to say that no one in the recent past has argued for any form of an imposition theory. But the few who have argued for a requirement of an imposition for criminal liability have slid back into subjectivism by watering down what would count as an imposition.

Fletcher and Gross are prominent examples.¹² Fletcher concludes that to be liable for an attempt "the actor must attempt an act punishable under the law, and, further this attempt must be dangerous on its face."¹³ Now if dangerousness on its face is a matter of imposing an objective risk upon someone, then Fletcher would qualify as a full fledged imposition theorist. At some points, Fletcher seems to adopt the full fledged theory, explaining an act that is dangerous on its face as "an objectively dangerous act that treads upon the rights of others."¹⁴

Unfortunately, Fletcher backs away from this objective formulation, sometimes taking it to be enough for "dangerousness on its face" that the act "bespeaks" criminality. Watching the act would cause us to be "apprehensive about the victim's welfare" even if we knew that on this particular occasion the victim was in fact completely safe.¹⁵ No doubt the "bespeaking" formulation appealed to Fletcher because of his previously developed concept of "manifest

¹¹ By the "old" common law, I mean the English common law prior to *Rex v. Scofield*, Cald. 397 (H.L.) (1784), in which case Lord Mansfield invented the law of attempt. Prior to that case the English law "started from the principle that an attempt to do harm is no offense." 2 FREDERICK POLLACK & FREDERIC MAITLAND, *HISTORY OF ENGLISH LAW* 508 n.4 (2d ed. 1903). See generally, EUGENE MEEHAN, *THE LAW OF CRIMINAL ATTEMPT* 8 (1984); Francis B. Sayre, *Criminal Attempts*, 41 HARV. L. REV. 821, 822-37 (1928).

¹² HYMAN GROSS, *A THEORY OF CRIMINAL JUSTICE* (1979); George P. Fletcher, *Constructing a Theory of Impossible Attempts*, 5 CRIM. JUST. ETHICS Winter/Spring 1986 at 53.

¹³ Fletcher, *supra* note 12, at 67

¹⁴ *Id.*

¹⁵ *Id.* at 64.

criminality”¹⁶ Whatever its provenance, “bespeaking criminality” leads back towards subjectivism, and thus towards results inconsistent with Fletcher’s own better arguments.¹⁷

Gross, too, starts on the right track in arguing that criminal liability morally requires harm or “a true threat of harm.”¹⁸ Gross, however, like Fletcher, quickly moves away from an imposition theory and back towards subjectivism. It turns out that a threat of harm, for Gross, is not a matter of the objective risk of harm, but rather of its “expectability” as measured by what the actor has reason to believe. In fact, for Gross, the reason an actor has for believing her act will be successful need not be a good reason or very much of a reason at all. Gross, like Fletcher, would impose attempt liability for picking an empty pocket, and for shooting into an empty bed, though the intended victim was a thousand miles away.¹⁹ In addition Gross would, under certain circumstances, impose attempt liability for receiving non-stolen goods or concealing from customs non-dutiable lace.²⁰ Gross is, of course, in good company in defending these positions, but for that very reason can hardly count as a thoroughgoing anti-subjectivist.

It is a measure of the hegemony of the subjective theory that its most notable opponents have made such substantial compromises in its favor.²¹ Although I will make an occasional comment here as to the failure of Fletcher or Gross to follow the path of the imposition theory, my arguments are primarily addressed to those who have not yet found the trailhead—the members of the great subjectivist consensus.

In the second part of this Article, I will sketch out one aspect of the detailed structure of the imposition theory of criminal liability. My concern

¹⁶ GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* (1978).

¹⁷ For example, Fletcher contends that dead women and consenting women can be targets of attempted rapes. The imposition theory, I argue, properly entails the opposite conclusion. See *infra* notes 82–85 and accompanying text.

¹⁸ GROSS, *supra* note 12, at 194.

¹⁹ GROSS, *supra* note 12, at 215; Fletcher, *supra* note 12, at 57–59.

²⁰ See, e.g., GROSS, *supra* note 12, at 209.

²¹ Robinson defends a strongly, indeed uniquely, objective theory with respect to justification, arguing that the defense “should be available even to defendants who lack knowledge of the justifying circumstances.” Robinson, *supra* note 2, at 289. When it comes to attempts Robinson is unwilling to accept the creation of risk as a predicate for liability. He does, however, contend that attempts create a harm of an “intangible character” against society, *id.* at 269, apparently by causing a “disturbance of the social order.” *Id.* at 270 quoting JOHN W. MAY, *LAW OF CRIMES* 191 (K. Sears & H. Weihofen eds., 4th ed. 1938). He seems comfortable with the possibility that even impossible attempts impose upon society in this way, and with their being criminalized by the legislature. *Id.* at 270–71. The social disturbance caused by an impossible attempt, however, is surely little more than discomfort at the wickedness or dangerousness evidenced by the action, leading directly back to subjectivism.

there will be only with so much of that theory as is required to apply it to the domain of attempts. In particular, I will show how my theory departs from the old common-law position that there could be no liability for any attempt.

That is, I will give an account of "actual imposition" on which some unsuccessful attempts to bring about criminal harm produce such impositions, and some do not. Those that do not are the "harmless" attempts of this Article's title. Attempts may be harmless either because they do not proceed far enough to produce risk or because they would impose no risk even if pursued through their last step. The latter attempts are "impossible," and they will be the particular focus of Part II.

Let me anticipate with a few examples. Lying in wait for a victim who is still some distance away is, I will argue, not yet an "attempt" at all, but even if it were, it would be a harmless attempt because there is no immediate risk imposed upon the victim until he comes within range. When he does come within range, and is fired upon with live ammunition, there is an attempt, and not a harmless one. Even if the shooter missed, the attempt was possible and properly gives rise to liability because it did impose immediate risk upon the intended victim. Firing a stage prop pistol and firing at a tree stump in the mistaken belief it is a person are harmless attempts. There is no immediate imposition. Similarly there is no risk, and hence ought not be attempt liability, for spooning what is in fact sugar out of an arsenic box into one's aunt's tea, for buying goods in the mistaken belief they are stolen, for the smuggling of lace in the mistaken belief it is dutiable, for picking an empty pocket,²² for shooting into a bed believed on good grounds to be occupied, or for trying to rape a deceased or secretly consenting victim.

Of course this all depends upon my being able to give a satisfactory account of immediate, objective risk, but that account must await Part II. My present concern is to show that there is enough good sense to the imposition theory to warrant a more detailed examination of the concept of risk upon which the theory depends for its account of attempts, harmful and harmless, possible and impossible.

II. ARGUMENTS AGAINST SUBJECTIVISM AND FOR THE IMPOSITION THEORY

I will here set out seven arguments in favor of the imposition theory of attempts and against the modern subjective theory

²² Brian Hogan, another of the select group who are on record against subjectivism, nonetheless sides with the subjectivists that there ought be attempt liability in empty pocket cases. Brian Hogan, *Attempting the Impossible and the Principle of Legality*, 135 NEW L.J. 454 (1985).

The first argument is partially descriptive in character. It looks to the fact that existing criminal codes are built upon the concept of imposition. Most obvious is the fact that offenses are largely graded in terms of the seriousness of their effects. In particular, the seriousness of the offense increases with the size of the theft, the seriousness of the physical injury, and the degree of the sexual imposition. Moreover, successful attempts, despite the complaints of subjectivists, are almost always of higher grade than unsuccessful attempts. The incompatibility of the subjective theory with these basic features of criminal law is not just an apparent incompatibility.

My second argument is that the subjective theory is radically incomplete. There are fact situations in which subjectivism is committed to there being criminal liability, but for which it lacks the resources to specify the offense for which the offender is liable.

For my third argument I draw upon the fact that the concept of criminal liability is closely bound to that of criminal responsibility. There is no liability unless the offender is responsible for the creation of some condition. In the end, only impositions have enough substance to count as such conditions.

The fourth argument is linguistic. It turns on the fact that ordinary usage does not recognize as attempts two broad and important groups of cases that count as attempts on subjectivist theories.

Political philosophy is the heart of my rather more extended fifth argument, which deals with the first category of harmless attempts—those that have not gone far enough to impose immediate risk. The argument focuses on the value of individual autonomy and liberty. The imposition theory leaves more scope for individual liberty, and less for state coercion, than do its rivals. In the course of establishing this, I will argue that the imposition theory is to be preferred because the pure subjective theory is flatly and unquestionably unacceptable in its treatment of liberty and autonomy and because there is no tenable middle ground between the pure subjective theory and the pure imposition theory. In short, no satisfactory alternative to the imposition theory is available.

Moreover, even if there were such an alternative, it would encounter grave difficulties drawing the line between liability and nonliability. Just what step is it on the path from plan to executed crime that crosses the line? My sixth argument is that the criterial verbal formulae of subjective theories are inevitably far too vague to provide adequate notice. These theories, then, fall short of minimal conditions of legality and due process.

My final, and weightiest, argument is one of retributive justice or fairness. It would be fundamentally unfair for society to impose upon the individual in the dramatic, serious, and stigmatizing fashion of the criminal law unless the individual has done something that imposes upon society.

A. The Role of Imposition in the Codes

The criminal law is not concerned with all immoral behavior. It is not even concerned with all seriously immoral behavior. I would hazard that a great deal of what parents do to children ought to count as seriously immoral because of its long-term effects upon the children's lives. Effectively uncontrolled television watching, for example, may severely limit a child's future potential. It is, however, not criminal to cripple the child's intellectual or emotional development in this way, or in most of the ways parents have such effects. Even depraved parenting, for example, the intentional and systematic undermining of the child's sense of self-worth, is not criminal.

Such seriously immoral, noncriminal behavior is not limited to the family. Teachers, supervisors, friends and lovers can, and do, impose psychic wounds more serious than those of most assaults. Not even when done out of the deepest depravity are these actions criminal, and no one proposes that they ought to be. Were criminal law primarily directed at depravity or dangerousness, it would be at least initially mysterious why so much dangerous and depraved conduct is not criminal. Other institutions of society, prominently including religions, have among their goals a far wider concern than has the criminal law for reducing the general level of immoral conduct. Perhaps the greatest paradox for the dangerousness version of subjectivism is that the most dangerous among us, the criminally insane, are diverted from the criminal justice system into institutions of mental health even when the acts they commit would otherwise count as criminal offenses.

Of course criminal law does have a function of protecting our persons and property, but its strong medicine is prescribed only under special circumstances, and according to a logic that deemphasizes personal dangerousness and, to a lesser extent, depravity as well.

If dangerousness controlled, it would be improper to grade intentional assaults by the seriousness of the physical injury caused. Under the New York Penal Law, to take a typical statutory scheme, one who intends to cause serious physical injury to another person is guilty of either a misdemeanor, a class D felony or a class B felony for identical blows leading respectively to physical injury, serious physical injury, or death.²³

Similarly, a stolen suitcase may contain almost nothing or a great fortune. Two different thieves, quite equal in depravity and dangerousness, who spirit

²³ See N.Y. PENAL LAW §§ 120.00, 120.05, 125.25 (McKinney 1987); *see also* MODEL PENAL CODE §§ 210.2(2), 211.1(1)-(2) (1985); FLA. STAT. ANN. §§ 782.04, 784.011, 784.021 (West 1992); ILL. ANN. STAT. ch. 38, §§ 9-1(b), 12-1, -2 (Smith-Hurd 1989); TEX. PENAL CODE ANN. §§ 19.02, 22.01(a)(1), (b), 22.02(a)(1), (b) (West 1989).

away such luggage may be guilty of offenses whose maximum penalties vary by a factor of 50.²⁴

It follows directly from the subjective theories that attempts ought to be punished just as severely as completed crimes. The more consistent exponents of subjectivism have argued strenuously for this proposition.²⁵ Despite the Model Penal Code's campaign to this end, however, many states have been reluctant to equate the penalty for the offense and its attempt.²⁶ The Model Penal Code itself recognizes that death or life imprisonment may be appropriate for murder but not for attempted murder.²⁷

Additionally, the prohibition against the prosecution's proving, at the liability phase, the defendant's bad character through evidence of prior crimes²⁸ is in some tension with subjective theories. If the point of criminal liability is as a marker for present depravity or future dangerousness, it should certainly be permissible to let evidence of character play a role in the jury's determination of guilt for the particular offense. The inference from prior bad acts to the probability of guilt could hardly be called "prejudicial," if the whole point underlying the criminal trial were to make a best judgment either of the offender's depravity or his dangerousness.

In short, the criminal law as a matter of course focuses upon the particular acts with which the offender is charged and is systematically sensitive to the consequences of those acts. This is not to say that the offender's depravity is never relevant to liability. To wound someone with intent to wound is typically

²⁴ Petit larceny, a class-A misdemeanor, carries a maximum penalty of six months for a first offender in New York State. Grand larceny in the first degree, a class-B felony, carries a maximum twenty-five year sentence for a first offender. N.Y. PENAL LAW §§ 70.00, 70.15, 155.25, 155.45 (McKinney 1987 & Supp. 1992). See also ILL. ANN. STAT. ch. 38, § 16-1(e) (Smith-Hurd 1989).

²⁵ See HART, *supra* note 7, at 129-31; Lawrence Becker, *Criminal Attempt and the Theory of the Law of Crimes*, 3 PHIL. & PUB. AFF. 262 (1974); see also GROSS, *supra* note 12, at 425. LaFave and Scott almost recognize this corollary of their position that dangerousness is the key to the law of attempts. ("Taking into account the rationale of attempt, a person who attempts a crime should be amenable to the same punishment as a person who completed the crime, subject to the qualification that extreme sanctions intended only for general deterrence should not be permitted.") LAFAVE & SCOTT, *supra* note 4, at 510.

²⁶ See, e.g., CAL. PENAL CODE § 664 (West 1988); FLA. STAT. ANN. § 777.04(4) (West 1992); ILL. ANN. STAT. ch. 38, § 8-4(c) (Smith-Hurd 1989); N.Y. PENAL LAW § 110.05 (McKinney 1987); TEX. PENAL CODE ANN. § 15.01(c) (West 1989).

²⁷ MODEL PENAL CODE § 5.05(1) (1985). For states that have followed the Model Penal Code in treating the attempt in the same way as the crime attempted, except for crimes punishable by death or life imprisonment, see CONN. GEN. STAT. ANN. § 53a-51 (West 1985); DEL. CODE ANN. tit. 11, § 531 (1987); ILL. ANN. STAT. ch. 38, § 8-4(c) (Smith-Hurd 1989); and PA. STAT. ANN. tit. 18, § 905 (1983).

²⁸ See FED. R. EVID. 404; *People v. Zackowitz*, 172 N.E. 466 (N.Y. 1930).

a higher level assault than is a reckless or negligent wounding. The gradations of homicide show the highest development of this phenomenon. Perhaps even dangerousness may be said to play a role, by indirection, in the main body of criminal doctrine. My thesis is only that the extent to which the particular offense is imposed upon society always and essentially plays a vital role.

This does not yet amount to a demonstration of my contention that an imposition is necessary to the proper ascription of criminal liability. It is enough at this descriptive stage of the argument to take note of the seriousness of the conflict between the law's core approach to liability and the subjectivist inspired criminalization of harmless attempts. The conceptual and moral depth of the conflict should become clearer as this essay progresses. It should also become clearer that the resolution of the conflict that is least disruptive of the corpus and spirit of criminal law is also the resolution that is most appealing as a matter of moral theory. It is to reject altogether the modern subjective theories.

B. The Incompleteness of Subjective Theories

As just discussed, one of the conflicts between subjective theories of criminal liability and the existing body of criminal law is in the grading of offenses. Existing law generally follows the principle that one act constitutes a more serious offense than another if the first caused substantially more harm than the second, even if both were done with the same mental culpability. This principle is inconsistent with subjectivism. In certain instances the failure of the subjective theories to conform to the existing law takes the form of a more serious pathology. In these instances, the subjective theories exhibit a radical incompleteness.

The incompleteness shows up in cases when the criminal law has several grades of seriousness based on harm and when there is nothing subjective to distinguish among them. Consider the attempt to pick an empty pocket. On the imposition theory, this behavior may be deemed a criminal trespass, as we all have a legitimate right to the privacy of our pockets. There is, however, no liability for attempted larceny here on the imposition theory because there is no objective risk that anything will be stolen from an empty pocket.

Partisans of subjective theories, of course, insist that this is irrational and that what we would in ordinary language call an attempt to pick a pocket should be recognized as an attempted theft by the criminal law. But what is it the attempted theft of? New York, to use this state as an example again, has five grades of larceny depending upon the amount stolen.²⁹ Suppose that a pickpocket is arrested after having put his hand into the empty pocket of a diamond district courier. Was this larceny in the Fifth Degree for an attempt to

²⁹ N.Y. PENAL LAW §§ 155.25–155.42 (McKinney 1987).

steal *something*, or was it Grand Larceny in the First Degree for an attempt to steal property of value more than one million dollars?

If the offender is so cooperative as to answer our questions, he is most likely to say that his intent was to steal whatever happened to be in the pocket. He knew that such pockets are sometimes empty and sometimes contain gemstones with aggregate value of a million dollars or more, and frequently contain cash or gemstones of lesser value. There is nothing in his intent that ties the act uniquely to any particular offense.³⁰

This circumstance is not specific to theft offenses or even to what is ordinarily thought of as offense grading. Suppose that the offender is annoyed by the loud music and party sounds coming from the windows of her next door neighbor. In fact what she is hearing is a recording of an earlier party. No one is home. When the offender throws a hand grenade through the window, she is unquestionably guilty of some serious property offenses, but what about attempts from the assault and homicide families? On the imposition theory, of course, there was never any risk of death or injury to anyone. So there was no attempted homicide or assault. The subjectivist, by contrast, is confident that throwing a grenade through the open window into what sounded like a crowded party is attempted murder.

But how many counts of attempted murder? This is more than an academic question as the number of years the offender will spend in prison will depend directly upon the answer. The offender is likely to insist that her intent was just to shake the partygoers up, but we may well conclude that her real intent was to kill "some" of the partygoers and to injure "others." Alternatively we might say that she behaved with depraved indifference towards the lives of *all* the partygoers. The imposition theorist would have no objection to this last formulation so long as "all the partygoers" is understood to mean all the *actual* partygoers, zero in number.

For the subjectivist, however, the number of counts of attempted murder or attempted assault depends not upon the objective facts but upon the facts as the offender believed them to be. But of course the offender need have no very specific belief as to how many partygoers were in the room into which she threw the grenade. Perhaps, if she were very cooperative, we could pin her down that she thought that there were at least six and no more than 35—although even this range is more likely a report of an estimate made upon reflection during the interrogation rather than a report of what was in her mind

³⁰ Of course, sometimes the would-be thief may have a belief that the pocket contains a particular thing. I am not arguing that the subjective theory is always indeterminate, but that it will be radically indeterminate in some cases.

It is a symptom of the extent of capitulation to subjectivism of Fletcher, Gross, and Hogan that their theories, in finding an attempted larceny in the empty pocket cases, share the radical incompleteness of the subjective theory. See *supra* notes 19 and 22 and accompanying text.

when she threw the grenade. Under these and similar circumstances, the subjective theory simply lacks the resources to specify the number of counts.

One way around this incompleteness, born of the fact that the subjective theory is incongruent with the imposition based structure of the criminal law, is to adopt a lowest denominator default position. In empty pocket theft cases, the attempt, under this approach, would be taken to be of the lowest degree of theft. In cases like the phantom party, the offender would be liable for one count of attempted murder. This puts a patch over the hole in the theory, but it is, of course, a very ad hoc patch, running utterly at cross purposes to the theory itself. The subjectivist would surely balk at charging an attempted theft from an empty bank vault as a low level misdemeanor or violation. But short of admitting that the theory is hopelessly incomplete because it tries to do without imposition, this is the best the subjectivist can do.

C. The Conflict Between Subjective Theories and Criminal Responsibility

A defendant has committed a murder only if the victim died and only if the defendant's actions causally contributed to that death. If the latter condition fails, the defendant is not responsible for the death. If the former, then there is nothing for which the offender could be responsible.

It is no accident or mere linguistic convention that there should be this connection between criminal liability and responsibility. The sanctions of the criminal law are among the most serious interferences that a state makes in the lives of individuals. Unchecked, these sanctions would be the stuff of social terrorism of the most threatening sort. Criminal law's chief internal protection against such excesses is the requirement that there be no criminal liability without criminal responsibility. The requirement of responsibility is what separates criminal justice from other forms of social protection.

So the offender must be responsible for something. I do not yet say that the offender must be responsible for an imposition. That is a perfectly natural step, but to take it directly would be to reach my conclusion a bit too quickly. As already suggested, the great majority of criminal statutes do require that the offender be responsible for an imposition. For the sake of argument, however, let us give the received view some space to work with by entertaining the possibility that criminal liability may be predicated on responsibility for certain states of affairs that do not rise to the level of impositions.

Consider three cases in turn. In the first, the defendant, with intent to kill, fires a bullet that strikes the victim in the head killing her. In the second, with the same intent, the defendant fires a bullet that just misses the victim's head. In the third the defendant, again with the same intent, fires a pistol that is, unknown to him, a harmless stage prop.

In the first case, the defendant is unequivocally responsible for the death. In the second, it is not difficult to find something for which the defendant is

responsible. Even in the absence of causing fright or the like, the defendant is responsible for the substantial risk to the victim's life that existed as the bullet sped through the air.

In the case of the stage pistol, one's first reaction ought, I think, to be that there is nothing here for which the defendant could be responsible. In the spirit of continuing generosity to the subjective theory, however, let us consider the hypothesis that the defendant is responsible for "shooting at someone with the intent to cause death and with the belief that there is a significant probability of causing death."

Does it properly describe the situation to say that we hold the defendant liable because he is responsible for this state of affairs? Such a description would be proper only if there is in this situation something that society takes to be an evil sufficiently great to sanction and if the offender is responsible for that evil. I will contend that, although there is something in this situation that society takes seriously and although there is something for which the defendant is responsible, the two are not the same.

In what does the seriousness of the situation consist? There would seem to be three possibilities: the defendant's evil character as evidenced by the act, the risk induced by the act, and the alarm actually caused by the act.

The last of these elements, of course, is perfectly at home in the imposition theory. If the victim was put in fear by the episode, then there was an imposition. Such lesser offenses as harassment or menacing are chargeable based on this imposition. This component of what the defendant did, however, clearly could not support a charge of attempted murder, as the subjective view would have it.

By contrast, the evil character evidenced is very different from an imposition. If we find in it the predicate for liability, then the imposition theory must be in error. Imposition would not be a necessary condition of liability.

It would be hard to deny that there is something that society regards as serious about so evil a state of mind. An evil state of mind is not, however, something that one can be said to be responsible for, in the sense of criminal responsibility. Under normal circumstances, we are not even causally responsible for our own desires or intents. We simply have this or that desire or intent.³¹

³¹ There are exceptional situations in which it would be fairly natural to say that one caused one's own desire. For example, if a prize were being offered for the person who could drink the most of a promoted soft drink, one might go for a long run in order to work up a good thirst. A contestant who employed this tactic has caused her desire for a drink. In a more important but far more tenuous way one's character is in some respects self-created. Our aspirations to be of a certain character have a long term, if less than determinative, influence on the sorts of people we are. As important as this may be for understanding and evaluating character, it is clearly a world apart from the tight and immediate causal relation that we demand for criminal responsibility.

More generally, when we are focusing upon the defendant's state of mind we are not really making use of the concept of moral responsibility at all. Moral assessment of character is a different and quite independent enterprise. Thus, insofar as the seriousness of the shooting with a stage prop is a matter of evidence of bad character, it falls outside the category of criminal responsibility

The defender of the received view might insist that I am under-describing what happened when the defendant fired the prop pistol. There is a substantial risk to society in shootings with pistols reasonably believed to be real and operable. As Fletcher would have it, the act under consideration "conform[s] to a dangerous-act type."³² The defendant is thus responsible for intentionally bringing about this sort of risk.

It must be granted that a statistical risk would become evident if we surveyed the results of "shooting at someone from such and such distance with intent to kill and the belief that the pistol is real and operable." The survey will surely turn up an impressive number of fatalities. They will occur in those cases in which the shooter's belief in the operability of the pistol was correct. These are all fatalities, however, for which other persons are entirely responsible. The stage prop shooter does not share in that criminal responsibility

Indeed, a moment's reflection should show that such a survey could have no bearing whatsoever on criminal liability for the stage pistol episode. Consider a defendant who was making the first use of an entirely new sort of deadly weapon. There is no past history of deaths or injuries resulting from the use of this weapon. If it turns out to have been unloaded, anyone with the slightest subjectivist leanings will argue for liability. Other killings for which the defendant might be said to be responsible cannot, therefore, be what is behind the subjectivist's intuitions.

It might be responded that I am still not being sufficiently general in abstracting from the particular situation. The subjectivist may insist that the new weapon user can be held responsible for past crimes with weapons of similar dangerousness. They need not be cases involving the same weapon.

Consider, then, what to say about a defendant who unknowingly used a stage prop pistol in a society that had been utterly peaceable for the last two hundred years. Now there is no past history of fatalities for which the defendant might be said to be responsible by statistical proxy. Still, if there is strong evidence of his intent to kill, say a confession, anyone but an imposition theorist is going to want to hold this defendant criminally liable. If he is held liable, it cannot be because he is criminally responsible for something. It can only be because he has revealed himself to be of bad character and potentially dangerous.

³² Fletcher, *supra* note 12, at 65.

What follows from all this is that there is no account of such impossible attempts—as shooting with a stage pistol—on which what society finds worthy of condemning in them is comprehended under the concept of criminal responsibility. Indeed, a close look reveals that what tempts us to impose liability for such attempts comes down in the end to the wicked character of the defendant or to his future dangerousness. Now perhaps there is a corner of the criminal law in which criminal responsibility is unnecessary for criminal liability and in which bad character or dangerousness is sufficient to send to jail those who have done no harm. The concept of criminal responsibility, however, plays a crucial role in protecting us from overreaching in the name of public safety. For this reason, we should be cautious in accepting the proposition that there may be criminal liability without criminal responsibility. We should avoid this conclusion unless the moral force of arguments supporting it is overwhelming. In fact, the opposite turns out to be true.

D *The Conflict Between Subjective Theories and the Meaning of "Attempt"*

The way ordinary speakers use a term will not necessarily control the contours of the legal concept answering to that term, but if the term is used in a statute, particularly a criminal statute, adopting a broader interpretation of the term requires a good reason. To criminalize an act as an "attempt," it *prima facie* ought to be an "attempt" in ordinary parlance. I follow Fletcher on this point³³ and in his conclusion that in many cases where subjectivist theory finds attempts, there is nothing that the ordinary speaker would so regard.³⁴ The instance that Fletcher discusses is one of mistaken belief. In addition, subjectivist attempts may fall short of being ordinary language attempts because their position is too early on the preparation-act spectrum.

1. *Mistaken Belief Cases*

An actor who does *X* under the mistaken belief that *X* is *P* is only said to be attempting to "do *P*" if she would desist in her attempt if she found that *X* was not in fact *P*. For example, a buyer of low priced cloth in the mistaken belief it is stolen would not have declined to buy the cloth if he found it had not been stolen.³⁵ One who has intercourse with a woman he believes underage would rarely have avoided the encounter if he knew her to be of age.³⁶ One who sought to get messages out of prison in the false belief that the warden did

³³ FLETCHER, *supra* note 16, at 160.

³⁴ *Id.*

³⁵ *Id.* at 162; see *People v. Jaffe*, 78 N.E. 169 (N.Y. 1906).

³⁶ *Id.* (*Jaffe* hypothetical).

not know of or permit their sending, would continue to send the messages if informed that the warden did know³⁷

Fletcher calls this counterfactual conditional test the "rational motivation" test.³⁸ With a minor caveat it does appear to be both a necessary condition of an ordinary language attempt, and a test that judges traditionally found compelling in applying the legal concept.³⁹ As those judges implicitly held, it would be improper to hold one liable for an attempt who was not aiming at what was forbidden by law⁴⁰

2. *Pre-final Act Cases*

Turning to the line between preparation and attempt, I will argue that an actor engaging in the later, but not last, steps of his criminal plan has not yet made an ordinary language "attempt" despite the fact that the subjective theory would find him liable.

Consider, first, the following change of mind case. An actor has done everything necessary to bomb a building short of activating the bomb's trigger. He is in the elevator of the building with his bomb when he decides to forget the whole thing, and go home. When he gets home he is asked, "Did you blow up the Exchange?" Actor: "No." "Did you even *try*?" "No, I had the bomb with me on the elevator, but then I changed my mind." "Try" here is doing the same duty as "attempt." The actor had not yet attempted to bomb the building.⁴¹

³⁷ *Id.*, see *United States v. Berrigan*, 482 F.2d 171 (3d Cir. 1973).

³⁸ *Id.* at 161.

³⁹ The counterfactual test might sometimes be satisfied for the "wrong" reasons. Suppose that Jaffe would, upon learning that the cloth was not stolen, start to ruminate on the fact that he did typically buy stolen goods. He might then come to question his whole mode of doing business, and decide to give it up and become a social worker. He therefore would decline to buy the cloth. Even if we believed this would be the outcome of the counterfactual test for a given individual, we would still not think that he attempted to buy stolen cloth. The fine tuning that would be required to correct Fletcher's test in this respect is not worth our time here.

⁴⁰ *United States v. Berrigan*, 482 F.2d 171 (1973); *People v. Jaffe*, 78 N.E. 169 (N.Y. 1906).

⁴¹ But could the bomber not have responded, "I *tried*, but I could not bring myself to go through with it?" This would, I think, be a proper thing to say if the would-be bomber had a struggle with his conscience before aborting his plan. If he simply had second thoughts, it would be improper. But even when proper, what the bomber is really saying is that he tried to overcome his conscience, not that he tried to bomb the building in the most central usage of that term. One might mark the difference by placing special emphasis on the "tried." He is indicating that he made conscientious efforts towards the completion of the plan, perhaps to mute the implied criticism of a coconspirator. He is not saying that he got so far as to actually make the attempt.

To describe the changed mind cases as non-attempts is clearly the correct ordinary language description. Ordinary language, however, is not so congenial to the imposition theory for failures caused by circumstances other than a change of mind. Suppose that the police have been tipped off to the possibility of a bombing and have sealed off the building. Then the conversation might have gone as follows. "Did you bomb the Exchange?" "No." "Did you even *try*?" "Yes, but I couldn't get into the lobby. The cops were guarding the door." Here the actor actually did less than on the previous case. Yet this case is an ordinary language attempt, and the former was not.

Similarly, all failures on which the actor had completed his side of the action count as ordinary language attempts, even if "impossible" (so long as they pass the rational motivation test). Those who mistakenly shoot into empty beds or at stumps are trying to kill, as is the poisoner who unwittingly uses sugar. The believer in voodoo is attempting to kill his victim when he sticks pins into a doll.

In at least some of these respects, then, ordinary language uses "attempt" too broadly for the purposes of the criminal law, even on existing versions of subjective theory (It is universally conceded that the voodoo case ought not give rise to liability.) In general, failures caused by circumstances beyond the actor's control count in ordinary language as "attempts" even in those cases where no one would propose attaching criminal liability, either because the "attempt" was too early truncated or because it was *too* impossible.

To find that ordinary language is more prodigal in its identification of attempts than is the criminal law should hardly be surprising. Criminal liability, being as serious a matter as it is, must, on any account, be parceled out sparingly. It would be a good deal more surprising, and troubling, however, if the criminal law were to count something as an attempt that would not be so called by ordinary speakers of English.

Consider the actor in the first example as he walks onto the elevator with his bomb. He is still following the steps of his original plan, but he has not yet arrived at the point of final decision whether to trigger the bomb. If the police apprehend him at that point, then he *had* attempted to blow up the Exchange under the usage just discussed. But how is ordinary language to be deployed the moment *before* he is arrested? At that moment had he "attempted" to blow up the Exchange? Suppose that a confederate reaches him by radio. "Have you blown up the Exchange?" "No." "Have you made the attempt?" "Not yet. I'm just about to get into the elevator."

So a police arrest of a suspect who is in the course of carrying out a criminal plan but who has not yet taken the last necessary step is an arrest of someone who has not yet made an attempt according to ordinary language. An arrest obviously cannot itself convert a non-attempt into an attempt for purposes of the criminal law. Therefore, the ordinary language usage on which it counts as an attempt once the arrest thwarts the plan may safely be ignored,

as well as such usage in cases where the arrest was made after something else thwarted the plan.

The relevant part of ordinary language, then, finds no attempt in an ongoing plan short of the final necessary act, just as it found no attempt to do *P* on a mistaken belief, if it would not have affected the actor's intentions had he found out that what he intended was not *P*.

3. *The Consequences of Ordinary Language*

It is time to consider in a little more detail what, if anything, is the significance for criminal liability about the way English is ordinarily spoken given these facts. It could be objected with some plausibility that this conflict between subjective theories of attempts and ordinary language is of little moment. The issue is one of policy, not language. It is to be expected that short English expressions may not correspond exactly to the contours of liability as set out by balancing diverse considerations of policy.

When the question is what crime ought be charged for particular behavior, however, ordinary language may have more weight than this objection suggests. If conduct that does not remotely resemble racketeering is swept by definition within the scope of a statute labeled "Racketeering Activity," there may well be a tendency to think of the conduct as more serious than it really is. This tendency may show up in either improperly high statutory penalties or in improperly severe judicial sentencing.

Attempted murder is properly a serious crime because of what attempts are. To sweep behavior within this category, if ordinary speakers would not regard it as an attempt, may well improperly inflate the criminal seriousness of the behavior.

More immediately, any theory that makes a criminal attempt of conduct that ordinary language would not regard as an attempt raises serious questions of statutory construction and fair notice. Criminal attempts are a special kind of attempt, but they must at least *be* attempts—unless the statute instead makes it clear just what they are.

E. *The Conflict Between Subjective Theories and Autonomy*

1. *The Priority of Liberty*

Consider the textbook noncriminal wicked person. He is driven by monstrous criminal desires. He spends his time plotting in great detail the most horrible acts. As luck would have it, however, circumstances always intervene to prevent him from taking even the first step of his then intended criminal campaign. He is not punishable because he has not in fact ever made the decision to carry his plan into action.

This particular wicked person is generally considered beyond the reach of the criminal law. The question is, why is he beyond it? On the pure subjective theory he is punishable, in principle. There are, however, contingencies in the real world that prevent our being sufficiently confident that any particular suspect is such a person. Without the decision to carry out even a preliminary act, the reasoning goes, we cannot have sufficiently good *evidence* that this individual is anything worse than a dreamer of evil dreams. We cannot be sure that he would make the decision actually to commit the crime. We do not, then, *know* that he is dangerous or wicked.

A different variant of subjective theory is based upon philosophical behaviorism. It contends that intents do not really exist until they are manifested in action. That is to say that there is no fact of the matter whether the person with wicked thought content really is wicked or dangerous until he acts.

On the imposition theory, the reason we cannot punish the pre-act wicked or dangerous person is because he has not imposed. It is not important whether there is a fact of the matter as to his intentions or whether we can be certain that he will make the decision to act. We can afford to be agnostic as to philosophical behaviorism and as to the potential sufficiency of evidence of depravity and dangerousness in the absence of acts. The point is that so long as one has not yet made the crucial criminal decision, he ought always be given the chance that he will decide against committing the offense. To make criminal liability hinge upon physical acts respects human freedom. No matter how wicked his mind, our subjective moral monster may always make the right decision at the last moment. However improbable this possibility, it ought to be respected.

What I want now to examine is the way subjective theories and the imposition theory stack up when measured against the desideratum of providing the maximum proper scope for individual liberty. On the imposition theory criminal liability rarely attaches until after the last act that the actor needs to do to bring about the state of affairs she intends. (Indeed criminal liability may not attach even then, but this point may be postponed for now.) On the pure subjective theory, liability may attach at any point. In principle, if not in practice, that can be before the actor moves a muscle.⁴²

This difference in the scope of liberty left outside the purview of the criminal sanction as between the imposition theory and the pure form of the subjective theory is not only significant, it is surely decisive. It would not be

⁴² For the philosophical behaviorist variant of the subjective theory, it cannot in principle occur before the actor does something observable. There must be an act sufficient to disambiguate the intention as one of the criminal variety. In this respect, this variant of the subjective theory is slightly less radical than the pure "evidentiary" theory. It goes a small step along the road towards the imposition theory, and is for that reason immune from the first stage of the argument here.

morally acceptable to employ the criminal sanction against one who had done nothing, however wicked or dangerous she might be. That would insufficiently respect the punished person's autonomy. That is, it would conflict with the principle that each person must be regarded in morality as the author of her own choices. It is wrong for an outside agency to impute those choices to the person.

As Fletcher argues, subjectivism tends to:

ignore an essential postulate in the relationship of the state to the individual in liberal society. Thoughts, intentions and feelings occur in the private sphere. The state needs some ground, some warrant, for probing into this realm of citizens' autonomy. This warrant obtains if the issue is that of assessing responsibility for having caused harm to others or, at the very minimum, for having subjected others to danger.⁴³

But, of course, opponents of the imposition theory feel no distress in the conclusion that the pure form of the subjective theory is unacceptable for reasons of liberty or autonomy. As already conceded, no one consciously holds the pure form of the theory. Popular, instead, are subjective theories on which personal dangerousness or wickedness are manifested in concrete acts. All such theories can make some argument that the autonomy of the actor has been respected. One or more of his own acts are essential predicates of criminal liability.

The availability of these manifested depravity/dangerousness theories is thought to enable their holders to avoid problems of autonomy and liberty without going so far as the imposition theory. The dangerousness theory, in particular, permits arrest and conviction of the manifestly dangerous before that dangerousness has come to fruition as harm or concrete danger⁴⁴—that is, before the imposition theory would ascribe liability.

2. *The Line Between Preparation and Attempt*

The "retreat" from the pure version of the subjective theory raises two questions. First, just how available are these purported middle positions between the pure subjective theory and the imposition theory? Second, do they give the actor a morally satisfactory measure of liberty?

What intermediate positions are there? On the spectrum extending from intent without act at one extreme to imposition at the other, the following

⁴³ Fletcher, *supra* note 12, at 65.

⁴⁴ For the pure version of the depravity branch of the "manifested" subjective theory, cutting off future danger is only a fortunate consequence, not a justification of liability. The point for this version of the theory is that it is criminal depravity itself that is the root of liability. Once such depravity has been made manifest nothing further is required.

points suggest themselves. Liability might first attach at the intending offender's first step, first (cumulatively) substantial step, first unequivocal step, first step at which apparent dangerousness licenses police intervention, first step at which there is proximate danger, or the last step. I will consider each of these possibilities in turn, and argue that each but the "last step" provides too narrow a scope for liberty. In addition, I will argue that none of the apparently intermediate positions is truly intermediate in that none has a justification that would not, if it worked, also justify the pure version of subjectivism.

a. *The First Step*

This conceivable, if unlikely, version of the subjective theory of criminal liability imposes only the requirement that the actor must at least have performed one voluntary act in furtherance of her criminal plan. This requirement appears to quiet the first and most compelling objection from autonomy to a subjective theory. That it is something of an ad hoc addition to the theory is not a serious criticism. There is nothing wrong in shaping a theory in terms of two quite different concerns, here dangerousness or wickedness on the one hand and autonomy on the other.

This particular marriage of subjective theory to autonomy concerns, however, is of the shotgun variety. Presumably the concern to take autonomy and liberty into account is a concern that criminal liability step back and give the actor significant moral space within which to make her own decisions. It hardly seems compatible with this motivation to permit criminal liability to attach the instant that there is a token physical act.

The first act may be quite innocent in appearance. The would-be murderer plans to go downtown to purchase a pistol. To that end she walks out the front door. Nothing in this act itself gives any evidence that the actor is dangerous. It therefore fails to provide any practical link between the theory and the adjudication of guilt.

After forming the murder plan and walking out the front door on the way to purchase a pistol, the actor might well reconsider while walking across the lawn towards her car. Perhaps, she thinks to herself, "it would be better to snub the victim rather than to snuff him." Determining to follow this new course of action, the actor puts her car keys in her pocket, picks up the newspaper and returns inside.

Suppose now, stricken by feelings of guilt, she turns herself in at the local precinct house, and gives a persuasive video taped statement in which she confesses to the above events. Her statement establishes that with intent to kill another human being, she voluntarily took a step in furtherance of that intent.

Even putting aside any evidentiary rule excluding uncorroborated confessions, this case surely ought not to be prosecuted. The reason to decline prosecution is not that the case is too weak in any evidentiary way. What the

actor did simply ought not to be criminal. Liberty requires a greater scope. It is still well within the minimum that must be accorded to autonomy to give the actor credit for changing her mind.

Credit for actually changing one's mind is available under abandonment statutes. These limitations on the law of attempt permit the agent to absolve himself of criminal liability for an ongoing but uncompleted criminal plan, usually by taking affirmative steps to derail the plan.⁴⁵ Such statutes protect part of the autonomy interest discussed here. It would not, however, be sufficient to engraft the abandonment limitation onto the first act theory. Had the actor written out a statement of her plan in advance, and had she been intercepted by the police as she walked towards her car, having not (yet) changed her mind, she still ought not be held criminally liable. She had not abandoned her criminal plan, but there remained so many opportunities for her to abandon it, that it would be far too stingy to autonomy concerns to hold her liable.

In short, the first step variant makes such a weak concession to autonomy as to be morally as unacceptable as the pure subjective theory. It does not, then, represent a viable intermediate position.

b. *A Substantial Step*

According to the Model Penal Code it is a criminal attempt if with appropriate culpability the actor "purposely does anything which, under the circumstances as he believes them to be, is an act constituting a substantial step in a course of conduct planned to culminate in his commission of the crime."⁴⁶

The problem with the "substantial step" test is illustrated by an actor who forms his evil plan while in the middle of the Olympic Mountains. He plans to murder a friend who is camping back at the trailhead where the actor left his car. Getting to the car requires three days of strenuous climbing, scrambling, and hiking. It is far and away the most time and energy that will be spent in the overall plan to get a pistol from the glove compartment of his car and empty it into his friend's head.

This actor ought not, however, be liable for an attempt when he reaches his car. The plan has almost been completed in terms of such quantitative measures as time and energy spent, but the would-be murderer has not yet faced the crucial points of decision that will test his resolve: getting hold of the pistol,

⁴⁵ See, e.g., MODEL PENAL CODE § 5.01(4) (1985) ("abandoned his effort or otherwise prevented its commission, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose").

⁴⁶ MODEL PENAL CODE § 5.01(1)(c) (1985); see also ILL. ANN. STAT. ch. 38, § 8-4(a) (Smith-Hurd 1989); CONN. GEN. STAT. ANN. § 53a-49(a) (West 1985); COLO. REV. STAT. § 18-2-101(1) (1986).

loading it, confronting his victim, and pulling the trigger. Again respect for his autonomy requires giving him at least some of these chances to change his mind, despite the fact that what he has already done to carry out the plan is unquestionably substantial.

This intermediate position, then, still does not give autonomy enough scope to constitute a meaningful compromise between the pure subjective and pure imposition theories.

c. *An Unequivocal Step*

It may be objected that "substantial step" should properly be understood not in terms of the quantity of effort or the percentage of the overall criminal plan accomplished, but in terms of the clarity of the step's referability to a *criminal* plan. It should be an act that would never or rarely be done except as part of such plan—"an act which shows criminal intent on the face of it."⁴⁷ The drafters of the Model Penal Code understood a substantial step in this general way. They required that a substantial step be "strongly corroborative of the actor's criminal purpose."⁴⁸ Perhaps this strong corroboration is intended to be somewhat less demanding than unequivocal criminality, but it is a close relative. In any event, it represents a significant addition to the notion of a substantial step as perceived by the actor.

Locating the crucial liability line at this point is a popular way of seeking to give the subjective theory something of an objective character. It is indicative of the subjectivist hegemony that such leading anti-subjectivists as Fletcher and the Fifth Circuit panel that decided *United States v. Onedro*⁴⁹ have also settled on versions of this unequivocality test.⁵⁰

By contrast, the most outspokenly subjectivist commentators, such as Glanville Williams, have attacked the unequivocality test as unworkable. Williams argues that we lack the conceptual resources to draw the line between unequivocal and equivocal.⁵¹ Without making a judgment as to whether this line-drawing difficulty is really fatal to the unequivocality test, I want to raise a more serious problem. That is that the test gives us the wrong results, even in clear cases.

The test does, of course, sometimes give intuitive results. To return to the mountains, it is unquestionable that the hike out of the Olympics fails the unequivocality test. The hike out is not corroborative, at least not to the outside

⁴⁷ *The King v. Barker*, 1924 N.Z.L.R. 865 (1924).

⁴⁸ MODEL PENAL CODE AND COMMENTARIES, Pt. I, at 329-31 (1985).

⁴⁹ 525 F.2d 881 (5th Cir. 1976).

⁵⁰ *Id.* at 885 ("Objective acts performed [must] mark the defendant's conduct as criminal in nature."); Fletcher, *supra* note 12, at 64.

⁵¹ Glanville Williams, *The Lords Achieve the Logically Impossible*, 135 NEW L.J. 502, 503 (1985).

world. It bears no stamp of criminality. Nearly everyone who hikes into the mountains eventually hikes out again. There would be no liability on the unequivocal test, and that seems altogether proper.

The problem arises in the following sort of case. A man buys a rifle with telescopic sight from an illegal street vendor saying, "I am buying this gun to shoot my wife." His purchase is unequivocally referable to his plan to kill his wife. It probably opens him up to liability on a weapons charge, but not yet to attempted murder. Attempted murder ought not be charged even if he rented a room opposite his wife's place of business, repeating to the landlord that he was renting the room to kill his wife. If the next day he removes the telescopic sight from the rifle and brings it to the rented room to check out his shooting angles, he will have compounded his unequivocal steps.

These actions taken together lack any semblance of innocent explanation. Still, few prosecutors would charge attempted murder. This prosecutorial reluctance would be fully justified. Most prosecutors would probably point to the fact that the rifle itself was not yet present at the intended assassination location. Therefore there was not yet an immediately dangerous situation.⁵² In autonomy terms, crucial choices still lay some distance in the future. This intermediate point is, then, not yet one that allows sufficient scope to autonomy to counter the fatal defects of the pure subjective theory. Inasmuch as the philosophical behaviorist version of the subjective theory entails some form of the unequivocal thesis, that position is untenable for these same reasons.

d. *The Step Licensing Police Intervention*

Suppose that a county council member of Cypress County has promised to "shoot between the eyes" any federal official responsible for raising his taxes. The President, having just signed a measure lowering exemptions to the federal income tax, is scheduled to make a speech at Cypress City. The council member is spotted in the crowd, carrying a pistol, for which he has a valid carry permit. The Secret Service may certainly detain the council member for the duration of the President's stay in Cypress. Just as certainly neither federal nor state prosecutors can charge him with attempted assassination, attempted murder or attempted assault.

The law of criminal procedure is crystal clear that the police may intervene on reasonable suspicion.⁵³ One cannot be found criminally liable, however,

⁵² See GROSS, *supra* note 12, at 195.

⁵³ See *Terry v. Ohio*, 392 U.S. 1 (1968). What is somewhat less clear are the outer limits of what the police can do on reasonable suspicion that a crime is soon to be committed. Brief detentions, pat downs for weapons, and confiscation of contraband found upon such pat downs are straightforward. Excluding the suspect from any place he would otherwise have a right to be is more troubling, but is presumably permissible if the exclusion is carefully calibrated against the apparent immediate danger.

without proof beyond a reasonable doubt,⁵⁴ or even arrested without probable cause.⁵⁵ This is from a moral point of view unexceptionable. The protection of the public from immediate danger ought to have a considerably lower trigger point than does criminal liability. Otherwise the system would either be under-protective or over-criminalizing. The interference with the agent's autonomy in turning him away from an intended crime is substantially less than in convicting him for that crime.

Recall that my current argument has a double purpose. First, it is intended to show that the imposition theory is more respectful of autonomy and liberty concerns than are its rivals. Second, by running through the stages at which liability for attempts might be thought to arise, I seek to show that there really is no viable position intermediate between the imposition theory and the pure subjective theory.

Turning to the second purpose, the discussion in this subsection purports to show that there is no point in opting for a theory on which criminal liability attaches at that step of the criminal enterprise at which the police may reasonably intervene. The intervention is possible and proper before liability attaches. Indeed, the realm of permissible police intervention must be greater than that of criminal liability, as a matter of constitutional logic.

With respect to my first purpose, however, it might be concluded that in conceding a right of the police to intervene at a stage prior to attachment of criminal liability, I have given away the point. If the scope of liberty is already curtailed by the authority of the police to act on reasonable suspicion, why be concerned where the line of criminal liability is? I concede that the possibility of police intervention preliability diminishes the difference in practice between a properly functioning imposition regime and a subjective regime.

It diminishes that difference, however, only slightly. To curtail liberty through the threat of criminal liability is inevitably more of a curtailment than results from police interference pursuant to their protective function. It is more restrictive first because criminal sanctions are substantially more serious infringements on liberty than are police protective practices, as the case of the Cypress councilman shows. Second, criminalization is more restrictive because of the phenomenon of over-deterrence. People may forego innocent actions if those actions might wrongly appear to be steps in a criminal enterprise sufficient for liability.

In short, criminal liability cannot constitutionally be attached at the earliest point at which police intervention is licensed, and there is no compelling reason to attach it as soon as constitutionally permissible. Immediate protective needs can be handled by intervention without liability. There is then no motivation

⁵⁴ See *In re Winship*, 397 U.S. 358 (1970).

⁵⁵ *Henry v. United States*, 361 U.S. 98 (1959).

for this intermediate position between the pure subjective and pure imposition theories. Autonomy again urges us on in the direction of the imposition theory

e. The Step Introducing Proximate Danger

This is the step that brings danger no more than moments away. If it simultaneously brings objective risk, then criminal liability will attach on the imposition theory as well as on any more subjective theory. Consider again the plan to bomb a building. Suppose first that the bomb is somewhat unstable. The bomber intends to place this bomb on the fourteenth floor. She is arrested with the bomb in the lobby. Because her actions had already imposed an objective risk of the bomb's explosion in the building, it is perfectly appropriate to charge her with a serious criminal offense. That the imposition theory would not necessarily denominate that offense an "attempt," is a relatively minor matter.

There is, however, a major parting of the ways if the dangerousness of the situation depends entirely upon a voluntary act of the intending offender. Suppose that the bomb is quite stable, and that it cannot detonate, practically speaking, unless the bomber goes through a fairly complex set of actions that only she understands. There is a danger here, but the only very significant danger is that the bomber will decide to complete her plan. Few prosecutors would be hesitant to charge attempt on these facts, but this time I contend that they would be wrong.

I do not deny that the police could and should intervene to confiscate the bomb. I do not even object to charging a lesser offense of weapon possession, although this introduces some complexities.⁵⁶ What I would argue against is attempt liability based on a risk of harm that is very unlikely to eventuate unless the actor makes a decision that she has not yet made. This is not an "objective risk" as I would use that phrase because it includes the subjective element of choice by the very agent who is the putative target of attempt

⁵⁶ Weapon possession offenses are partially inchoate in character. Insofar as the purpose of a possession statute is to address the risk that the possessor will intentionally use the weapon and thereby bring about a concrete evil, it is functionally similar, from the imposition theory's standpoint, to an attempt statute that predicates liability at too early a point. Insofar as the purpose of the statute is a concern for the general risk involved in having such a weapon around, independent of intentional use by the possessor (accidental firing, falling into the hands of children), it is supportable on the imposition theory. In addition, the severity of possession offenses may sometimes be a function of a legislative desire, unprincipled on any theory, to make a high penalty available when the prosecution cannot prove the substantive offense (murder, robbery, assault) that it is confident the offender committed. So on the imposition theory the acceptability of a possession statute will turn on its specific contours, and on the severity of its penalty. The details of this would require a lengthy separate discussion.

liability (It would count as an objective risk if whether harm would eventuate depended solely upon the actions of potential victims, for example in walking close to the bomb.)

The risk that depends essentially on the actor's choice to pull the trigger is different from the risk posed by the same bomber who has not yet assembled her bomb (but is certain to do so). It is different with respect to the immediacy of the threat. The supporter of making this the threshold of liability might contend that it represents a genuinely intermediate position between a pure subjective theory and the imposition theory. It denies liability for those certain to commit crimes if the harm, or the last act that would lead to harm, is still some distance in the future. In this way it creates room for a change of heart during the intervening period, as the imposition theory contends for. If there is an immediate risk that the offender will pull the trigger, however, the position sides with the subjective theory, not requiring that the trigger actually be pulled before liability attaches.

Is it correct that this proximate danger position represents an acceptable compromise between imposition and subjective theories by ceding to the imposition theory exactly as much as sanely can be ceded? The issue between the proximate danger position and the imposition theory, again, is not whether the police should intervene. Of course they should. The issue is what the intending bomber is to be charged with once it is determined that her bomb posed very little danger unless she went through a series of intentional steps. The proximate danger position contends that she ought be charged with the attempted bombing (presumably an attempted murder); the imposition theory contends for a lesser possession charge.⁵⁷

The issue separating the two positions is the propriety of treating with equal seriousness the bomber who does trigger the device and the bomber who does not, assuming that in the first case intervening circumstances prevent an explosion (perhaps an undetectable flaw in the bomb's construction). Why should the criminal law ignore the stunning difference in culpability between the two?

There appear to be three ways that the proximate danger advocate could respond to this challenge. Two are from the perspective of the dangerousness version of subjectivism and one from that of the depravity version.

⁵⁷ The possession charged would, in turn, have to be based on that lower level risk that the bomb posed if not triggered by the actor. In the conceptually pure, if practically impossible case, in which it posed no risk at all except through the actor's intentional triggering, there could not even be liability for possession on the imposition theory. See *supra* note 56.

(1) *Dangerousness Version*

First, a dangerousness theorist could argue that the decision to detonate is irrelevant because the situation, predecision, is already sufficiently dangerous to merit the more severe punishment. Under our hypothesis, however (stable bomb with complex trigger), there is almost no danger in the situation outside the risk that the fateful decision will be made. Abstracting from the risk of a decision to detonate, the bomb poses no greater risk than similar items in a military arsenal. If there is a very low probability of the decision being made, then the total danger is modest. So a danger great enough to predicate an attempted murder conviction cannot possibly be made without taking into account the probability of the crucial criminal decision. The decision having not as yet been made, it would be unfair to predicate liability upon it.

The second move that the immediate danger advocate with dangerousness concerns may make is to argue that in any such situation the risk that the actor will trigger the bomb is shown by the attendant circumstances to be high enough to conclude that the overall danger is indeed substantial, and thus that attempt liability is warranted.

On the dangerousness theory the only significance of criminal intent is as an intermediate stage in the calculation of dangerousness. The evidence that the actor brought the bomb into the building is evidence of her intent to explode it in the building (absent other explanations). That, in turn, is evidence that she has a dangerous propensity to pull the trigger. (People's intents change, of course; some are firmer than others; some will have more time over which to weaken; but that someone intends to do something that is possible for her to do almost always adds to the probability that she will, in fact, do it.)

If liability is warranted on this basis, however, it should be warranted any time we have a given level of confidence that a person has such a propensity and any means available that would be a threat to life were the propensity to be realized. Suppose, then, that we installed at thruway and bridge toll booths a device that was highly accurate in detecting imminently homicidal propensities. The device would focus on each driver as he or she paid the toll. When the device alerted, we could arrest the driver for attempted murder on the theory that the automobile is a device capable of causing death in a short time frame if used in furtherance of a homicidal tendency. Of course, no one but a member of that mythical group—the pure subjective theorists—would be comfortable with such a conclusion. What this shows is that the immediate danger position is only apparently a middle position between pure subjectivism, of the dangerousness sort, and the imposition theory. Its tenability ultimately depends upon its advocates' willingness to swallow the whole dangerousness pill. Sufficiently good evidence of immediate dangerousness alone will support a conviction for attempt.

The proximate danger theorist can, of course, deny that there ever could be a propensity predicting machine good enough to match the evidentiary force of the circumstances attendant upon the intending bomber's apprehension. This a priori pessimism as to the future of technology is made somewhat doubtful by well-known and striking historical counterexamples. At the same time the position may well be unduly optimistic as to the predictability of a decision to trigger a bomb based upon the circumstances at the time of the bomber's arrest. If a good prediction machine is impossible because it is impossible in principle to predict free human choice, then of course it would be impossible to place a probability on the bomb possessor's pulling the trigger. If the machine is impossible because, as the behaviorist would have it, there is no such thing as a (disambiguated) intent until the act that carries it out, then the pre-triggering bomber likewise has no sufficiently unambiguous intent to license convicting her.⁵⁸

Whether there could actually be a good criminal propensity predicting machine is, in any event, irrelevant. The moral questions take precedence. Even *were* there such a machine, it ought not be used for imputing criminal liability. Alternatively put, insofar as any device approximated such a machine, it ought not be so used. The moral force of this point is independent of the possibility or impossibility of the machine. The moral objection to the use of the machine, or a weak version of it, is equally an objection to any position that elevates evidence of dangerousness in the future to the level of a predicate for criminal liability. In fact, a trier of fact who hears evidence of dangerousness and is asked to conclude as to propensity, is in essence just such a machine.

(2) *Depravity Version*

Versions of subjectivism based on depravity rather than dangerousness are not as likely to find the immediate danger position appealing. It is arguable, however, that one who intends to blow up a building within the next five minutes is more depraved than one who intends to do so within the next five weeks. Would not, however, any such theorist also want to distinguish between the depravity of someone who has pulled the trigger (of a bomb that fails to explode) from someone who merely intends to do so within the next five minutes? Perhaps there could be this sort of reply:

The failed bomber who pulled the trigger is marginally more depraved than one who had a fixed intent to do so within five minutes. That difference might be reflected in sentencing. But in forming the fixed intent to cause the evil in a short time frame, the offender had already crossed over the line. Her depravity,

⁵⁸ I am not here speaking of unambiguous *evidence* of the actor's intent. The evidence need not be unambiguous, but only beyond a reasonable doubt. It must, however, be evidence that his state of mind is one of intent, not indecision.

though somewhat less than one who pulled the trigger, was already sufficient for serious criminal liability at the attempted murder level.

I find this reply troubling because the difference in depravity between the fixed intent to murder in five weeks and a similar intent to murder in five minutes seems to me morally less substantial than the difference in depravity between one who has a fixed intent to murder in five minutes and one who pulls the trigger. The difference in the latter case is great because of the importance, for depravity, of the final decision to detonate. What chiefly distinguishes the five week from the five minute intent, by contrast, is immediacy of danger, but that has already been dealt with.

Moreover the depravity version of the immediate danger position must also commit to convict on the output of a machine with appropriate mental scanning powers. In the case of the depravity theory such a machine must focus on intent rather than propensity. For the dangerousness theory, intent is just a stepping stone to propensity, but for the depravity theory intent is the essential predicate of liability. That difference, however, does not alter the force of the argument. If a sufficiently good mental scanner indicates a sufficiently fixed intent to commit a crime within a sufficiently short framework, the depravity version of the immediate danger position would require conviction. For the reasons already given, the moral objections to the use of such a machine, provide a decisive reason to reject the depravity version of the position just as they did the dangerousness version.

A closer examination of the immediate danger positions, then, shows again that the imposition theory leaves more space for individual autonomy. The step at which the situation becomes dangerous, if not understood in the objective fashion demanded by the imposition theory, comes down to punishing the offender *solely* because of subjective dangerousness or depravity.

f. The Last Step

I have not found any remaining American jurisdiction in which attempt liability attaches only after the actor has performed the last act that he need perform to carry out the plan.⁵⁹ Though in many respects less "objective" than the imposition theory, the last act approach was far too objective to survive the onslaught of modern subjective theory.

It may, then, seem somewhat quixotic to distinguish different versions of positions on which liability does not attach until or after the last step by the actor necessary to bring about the harm. Inasmuch, however, as these positions have already been shown to have advantages over subjective theories with

⁵⁹ See, e.g., N.Y. PENAL LAW § 110.00 (McKinney 1987) ("conduct which tends to effect commission of such crimes"); see also statutes cited *supra* note 46.

respect to the autonomy family of concerns, some investigation of them is in order.

Last necessary steps come in four varieties, depending upon whether or not they are irrevocable and whether or not they impose objective risk. A last step is irrevocable if, once it is done, there is nothing that the actor can do to diminish the probability that the harm will occur. If the harm does not occur, it is for reasons beyond the control of the actor. Firing a bullet is almost always an irrevocable last act. Handing a glass of poisoned tea to a victim is a revocable last act, although it may be revocable for only that brief period before the victim takes the first swallow.

Autonomy is maximized in one respect by requiring the point of irrevocability to be passed. It is only then that the actor has lost his last chance to change his mind and abort his evil plan. Assuming then that the last act position is motivated by a large concern for autonomy, the last irrevocable act version is its natural form.

I will, however, argue against identifying attempt liability with the occurrence of a last irrevocable act. Instead I will argue that liability should attach if there has been an attempt, per ordinary language, and the offender's actions have imposed a sufficient risk of what was attempted coming about. Liability will attach to any last act that imposes sufficient objective risk, whether the act was revocable or irrevocable.

(1) Liability for Revocable Last Acts that Impose Risk

There is a good reason to criminalize even revocable last acts that do impose an objective risk. Suppose, for example, that the actor has lit the long, slow-burning fuse of an explosive device. He has now done the last affirmative act necessary to bring about the harm. Still there are several seconds during which he could run ahead of the spark to cut the fuse. Suppose that the actor does nothing, but that during the period of time in which he could have averted the explosion, the fuse goes out due to other causes. Must we find the actor not guilty of the attempt?

The answer from the perspective of the imposition theory depends upon whether an objective risk existed at the time the actor lit the fuse. If, unknown to the actor, the police had already cut the fuse close to the bomb, then there never was an objective risk, and there is no criminal liability. If, however, the fuse was intact when lit, then there was an objective risk, and liability attaches. There was an objective risk even if the actor might have been able to run ahead and cut the fuse, because the risk arose when the fuse was lit unless it was inevitable that he should cut it. But it could never be inevitable that he should cut the fuse even if he formed the unshakable intention to do so immediately after lighting the fuse, inasmuch as there would always be some possibility that he would trip or have a heart attack.

One can believe strongly in giving autonomy a maximum scope and still believe that that scope is bounded by the principle of an actual imposition of risk. The imposition of significant risk of serious harm violates an important right of the victim—a violation that takes precedence over the actor's liberty. It is for this reason that the imposition theory is to be preferred to the irrevocable last act position—the more natural of the last act positions.

For these same reasons the last act position can hardly be represented as intermediate between the pure subjective and imposition theories. In its irrevocable last step form, this position is more protective of certain dangerous and depraved actors than is the imposition theory.

(2) No Liability for Irrevocable Last Acts that Impose no Risk

Let me turn now to those cases where the last act position would impose liability, but the imposition theory would not. These include such cases as shooting with a fake gun in the belief it is real, shooting at pillows in bed in the belief they are a person, and using voodoo pins.

That an act is the last act necessary by the actor and irrevocable does not entail any objective imposition. So far as I know, once one has stuck the pins in a properly made voodoo doll, there is not supposed to be any way to undo the curse. The shooter at a lump in a bed could not call out in time for the lump to jump to safety were it a person instead of a pillow. These acts are then, irrevocable, but to criminalize these acts would restrict the actor's liberty, in the absence of a correlative violation of the intended victim's right to life. The victim's life was not put at risk.

Another conceivable reason to prefer the imposition theory in these cases is the possibility that the actor subconsciously aborted his criminal plan. Suppose that the last choice has been made, and that circumstances intervene so that neither harm nor concrete risk ensues. The harmlessness of the attempt might be partly the result of the fact that the actor chose to commit his crime in the way he did because he subconsciously was aware that the plan might fail conducted in that manner.⁶⁰ Subconsciously he acted against the criminal plan. The actor, turned defendant, could then argue that to respect his autonomy is to respect him as a whole person, taking into account his subconscious as well as his conscious choices.

There is some question whether subconscious choices ought to count for as much as conscious choices in defining a person's autonomy. Still, it does seem plausible that if there is any respectable sense in which the actor chose to lessen the risk of his behavior and if that choice led to the result that he did not

⁶⁰ See Note, *Why Do Criminal Attempts Fail? A New Defense*, 70 YALE L.J. 160 (1960). This anonymously published note has been claimed by Professor Dershowitz. ALAN M. DERSHOWITZ, *THE BEST DEFENSE* (1982).

impose upon society, to deny criminal liability is to take his autonomy as a total person seriously. To put this point in a slightly different way, because choice is complex, and may have subconscious elements, it may misread the actor's real choice to take him to have chosen something other than what happened.

This move is implausible when the actor has chosen a means well suited to its criminal end, has carried through proficiently, and is foiled by circumstances that could not have been anticipated. If a heroic bystander with sprinter speed dashes to pull the battery from a bomb the instant before it would have exploded, the would-be bomber should not get much credit for subconscious sabotage. By contrast, in those cases in which the actor chooses an unsuitable means or carries it through negligently, subconscious sabotage seems a respectable possibility.

Not all harmless attempts are good candidates for the subconscious sabotage explanation and not all cases in which subconscious sabotage is a candidate impose no risk. There is, however, a substantial overlap. We may well doubt the subconscious intentions of the voodoo pin stickers and those who shoot at stumps in the "belief" that they are people. Because subconscious sabotage is so speculative, however, I regard the present argument as less telling than the more fundamental point that there ought be no imposition of liability in the absence of a correlative violation of the victim's rights.

g. Summing up on Drawing the Line

What I conclude overall from surveying the different stages of an attempt at which liability might attach, is first, that it is the imposition theory that goes as far as we reasonably can go in giving scope to individual autonomy and liberty interests. When we cannot reasonably go further is when increasing the actor's scope of liberty means the imposition of an actual and objective risk on other individuals.

Although I think the moral appeal of the imposition theory is substantial because of its compatibility with the widest acceptable liberty, I do not want to overstate this advantage. First, notice that criminalizing the final imposition may well deter the actor from all the steps leading up to that imposition. No initial segment of the steps would itself be subject to sanction, but presumably those steps lose their point if the actor is deterred from completing the series. In that way, all prior steps too are deterred. In particular, the actor will be just as deterred from committing the last act that issues in an impossible attempt if the imposition test governed, as she would be on a subjective test, assuming always that she believes that her attempt is possible.

The advantages for autonomy justly claimable by the imposition theory are, first, that the actor has the chance to change her mind right up to the last act of the criminal plan, and, second, that innocent actors will not be subject to

“over-deterrence.” The actor will be less wary of engaging in actions that might reasonably, but mistakenly, be seen as part of a criminal plan.

The examination of the various proposed stages for imposition of liability also yields the conclusion that there is no intellectually tenable position that is intermediate between the pure subjective theory and the pure imposition theory. The possibilities include the first step, first substantial step, first unequivocal step, first step licensing police intervention, and first step introducing immediate danger. None of them in the end is any more acceptable than the full subjective theory. The last act position is not genuinely intermediate between subjective and imposition theories, and, in any event, is inferior to the imposition theory where the two come into conflict.

3. *The Rationality of the Imposition Test for Attempts*

I want now to look at these liberty-autonomy issues from a more general standpoint. Is the greater liberty that comes from not criminalizing impossible attempts and insufficiently developed attempts something that would be rational to choose under choice circumstances designed to promote fairness among the members of society? Suppose that you and I are bargaining about what shape the criminal law of our society is to take from behind a “veil of ignorance” as to our respective positions in society. Either of us may turn out to be victim or aggressor. We both have knowledge of the degree of social aversion to the various types of conduct that are candidates for criminalization.⁶¹

We pose the question whether to criminalize an act done out of evil motive but that imposes no risk upon the other. *Prima facie* we conclude against criminalization. To criminalize would lower my prospects if, upon lifting of the veil, I am the aggressor, but would not raise my prospects if I am the victim.

It might be objected that my idealized choice argument, if it proves anything, proves too much. If I am the victim, my prospects are not diminished even by a *possible* attempt, so long as it is unsuccessful. Behind the veil I have woven, would we not conclude that no attempt should be criminalized? That an attempt imposes risk lowers my prospects only prospectively. Criminal liability attaches retrospectively. The aggressor’s conduct will, in any event, be guided, if guided at all, by the primary prohibition against the completed crime. One might reason, I do not like to have risks imposed upon me. But if the risk leads

⁶¹ See generally JOHN RAWLS, A THEORY OF JUSTICE 136–39 (1971). This use of choice behind a veil of ignorance is, of course, somewhat different from Rawls’. Rawls was concerned with principles related to the basic structure of society under the assumption of perfect compliance. What to criminalize is a matter of imperfect compliance theory, located for Rawls at the constitutional or legislative stage. Using the veil, here, is then more an adaption than an application of Rawls’ device. What it is rational to choose under circumstances of fairness is, however, of moral weight in these circumstances as well.

to nothing, I would rather that, than suffer a criminal penalty. Therefore, I will prefer a system in which attempts are not "criminalized."⁶²

The reason it would be rational, behind the veil, to criminalize possible attempts is a matter of another feature of criminal justice—the need officially to denounce criminal acts.⁶³ The veil does not filter out our knowledge of the social aversion to the act that sends a bullet whizzing by an intended victim's head. Even knowing that I might be the aggressor, knowing that I might not be, gives me a good reason for wanting to live in a society in which actions that impose this sort of objective risk are denounced through the emphatic pronouncements of the criminal law.

Denunciation through criminal punishment, I hope and presume, has deterrent effects. My argument here, however, does not depend upon deterrence. The shot at the head, like the brutal rape murder, must be officially and emphatically denounced even if such denunciation has no deterrent effect. The denunciation must be made as a demonstration that society stands with the victim and respects her rights.

When it comes to attempts without risk, however, the situation changes. There is no longer a wrongful act that imposes upon any other member of society. There is not an outrage that demands denunciation. What there is, is an exhibition of bad character. We should not, I think, risk the possibility of criminal liability to ensure the denunciation of bad character. There is a place for the denunciation of bad character in the less coercive sphere of moral training.

I conclude from these general considerations that there is at least good reason to believe that a just society would be so designed as not to criminalize attempts that impose no risk.

⁶² Of course, an unsuccessful attempt may simultaneously be a completed crime of another description. An attempted murder is often an actual assault. By making the offender liable for higher penalties under the attempt statute, we arguably increase the level of deterrence against actions that lead to injury. But from behind the veil, I am equally concerned to avoid such injuries whether they are the result of attempted murder or of conduct of lower culpability. Therefore, the rational agreement would place the "right" level of deterrence on the assault itself, rather than to increase that level of deterrence in a way that has gratuitous costs for liberty in certain cases.

⁶³ See A.C. EWING, *THE MORALITY OF PUNISHMENT* 32-35 (1929); JOEL FEINBERG, *DOING AND DESERVING* 118 (1970); IGOR PRIMORATZ, *JUSTIFYING LEGAL PUNISHMENT* 149-54 (1989); JAMES FITZJAMES STEPHEN, *A HISTORY OF THE CRIMINAL LAW IN ENGLAND*, vol. II, 81-82, 207 (1883); ANDREW VON HIRSCH, *DOING JUSTICE* 48-49 (1976); ANDREW VON HIRSCH, *PAST OR FUTURE CRIMES* (1985); Jean Hampton, *The Moral Education Theory of Punishment*, 13 *PHIL. & PUB. AFF.* 208 (1984).

F *The Conflict Between Subjective Theories and Legality*

After quoting the Model Penal Code's "substantial step" language and that of the English statute of 1981, requiring something more than "mere preparation," Fletcher wonders in print "whether these pronouncements are meant as a satire on the principles of legality and fair-warning."⁶⁴ The point is that when we lack objective imposition as a touchstone, the arbitrary line drawn at some point along the stages of the process of execution will inevitably be represented by a verbal formula of great vagueness. Fletcher's own unequivocal or "manifest criminality" formula suffers from the same disease.

The problem is not that the subjectivists have been inadequate wordsmiths. The problem is not one of language but of the reality the language seeks to capture. Steps towards the execution of a crime are just too varied in nature and shade into each other in ways that are far too subtle for us to expect to find a single nonvague verbal formula that would acceptably draw the line between liability and nonliability. To have any chance of capturing the liability intuitions of subjectivists, the verbal formula must have considerable flexibility. But, of course, this flexibility is bought at the cost of legality and notice. The simple truth is that when any version of the subjective theory holds sway, a potential offender can have no confidence as to how much conduct towards the commission of a crime will be sufficient to constitute an attempt—unless there happens to be a case directly on point.

The imposition theory avoids this problem by declining to draw a line across the stages of execution. The line is drawn on the side of the results of conduct. In case of attempt, the results are, of course, risks rather than injuries. That introduces an issue of the definability of risk, but as I will shortly demonstrate, that is a problem of definition far more tractable than distinguishing between preparation and attempt.

G. *The Conflict Between Subjective Theories and Retributive Justice*

This section will develop more specific reasons for believing that it would be fundamentally unfair to criminalize attempts that impose no risk. I will argue that to do so would violate deep principles of retributive justice—principles that are essential to society's license to punish offenders.

The state has one or more purposes in punishing. Among the most plausible candidate purposes are the control of crime, the denunciation of criminal acts, the vindication of the rights of victims, and the satisfaction of a social desire that wrongdoers suffer. For the state justly to punish a person for

⁶⁴ Fletcher, *supra* note 12, at 60.

any or all of these purposes it must have a morally satisfactory license to treat the offender in ways that would otherwise violate his rights.⁶⁵

How does the state acquire this license? The possible answers to this question can be divided into two branches, the second of which will branch again.

1. *The Implausibility of a Utilitarian License to Punish*

The first possibility is utilitarianism. Because it redounds to the social good to punish the offender, he has no right not to be punished. In effect, no license is required. This approach supports a pure subjective theory of criminal liability. Sufficient evidence that someone is dangerous would permit society to impose upon him so long as the expected costs of doing so are less than the expected costs of leaving him alone. There is no a priori limit on the sort of evidence of dangerousness to be taken into account or on the severity of the punishment.

I will attempt no refutation of utilitarianism in this paper. I will here only remind the reader how radical is the hypothesis that citizens have no rights against the state when it comes to criminal punishment, or equivalently, have only rights that disappear the instant punishment becomes socially useful. This conception is in fundamental conflict both with the spirit of criminal law and with our sense of the unique worth of the individual.

2. *The Implausibility of a Consent-Based License to Punish*

The second branch of potential justifications for state intrusion upon the individual in criminal punishment relies upon the proposition that the offender's moral status changes when he commits an offense. The offender "forfeits" certain rights. Some such notion of forfeiture has been a centerpiece of retributive theories of punishment, and has seemed intuitive enough to many nonretributivists.⁶⁶ But to say that there has been a forfeiture of rights does little more than restate the problem. By virtue of what does the offender forfeit rights, and what is the scope of that forfeiture?

There are two possibilities to pursue. The first is the theory that the offender has impliedly consented to his punishment. The second is that it is not

⁶⁵ See W.D. ROSS, *THE RIGHT AND THE GOOD*, 56-64 (1930); Alan H. Goldman, *The Paradox of Punishment*, 9 PHIL. & PUB. AFF. 42, 44 (1979).

⁶⁶ See DAVID HUME, *INQUIRY CONCERNING THE PRINCIPLES OF MORALS*, § III, part I, ¶ 10 (C. Hendel ed. 1957); ROSS, *supra* note 65, at 60-63; GEORGE SHER, *DESERT* 84 (1987); Goldman, *supra* note 65, at 44-45; Christopher Morris, *Punishment and the Loss of Moral Standards*, 21 CANADIAN J. OF PHIL. 53, 63 (1991); Ernest van den Haag, *Punishment: Desert and Crime Control*, 85 MICH. L. REV. 1250, 1255 (1987).

unfair to punish him, without his consent, because in so doing the state does nothing more than reciprocate for the offense.

There is some plausibility to the theory that the offender's forfeiture is a member of the waiver or consent family of concepts. The offender voluntarily committed the offense with at least constructive notice of the penalty. Why should he not be held to that penalty? The theory need not contend that there is express consent, so long as committing the criminal act has the moral force of consent.

Strong versions of the consent theory take the offender to have consented impliedly to any penalty permitted under the criminal code or to any such penalty that has utilitarian justification.⁶⁷ Alternatively, the forfeiture may be limited by a proportionality requirement among offenders, as well as by consequences.⁶⁸

Whatever plausibility implied consent may have as a justification of criminal punishment, it surely can have no more force than genuine consent. This entails that there be good constructive notice and reasonable offender capacity. It also follows that the whole notion of implied consent becomes terribly implausible for severe penalties. In brief, for severe penalties, the consent imputed through the commission of the criminal act becomes too unlike true consent to retain any of the moral force of such consent. Implied consent to severe penalties suffers from the same pathology as do unconscionable contracts.

3. *The Reciprocity-Based License to Punish and the Imposition Requirement*

If the crucial criminal forfeiture is not a matter of a member of the consent family, and thereby of the potential penalty of which the offender is on notice, it must be found in some feature more intrinsic to the criminal act. The degree of wrongfulness of the offense is the natural candidate for measuring the extent of the offender's forfeiture and therefore of the state's license to treat the offender in ways that would otherwise violate her rights. The severity of what the state may do to the offender will be a function of the seriousness of what the offender has done to her victims. This is a form of the moral principle of reciprocity. Reciprocity principles have long been associated with justice in criminal punishment.⁶⁹

⁶⁷ See, e.g., Carlos Nino, *A Consensual Theory of Punishment*, 12 PHIL. & PUB. AFF. 289 (1983).

⁶⁸ See, e.g., HART, *supra* note 8, at 22-25.

⁶⁹ See, e.g., *Leviticus* 24:19-20; ARISTOTLE, *NICOMACHEAN ETHICS* V, ch. 4 (W.D. Ross trans., 1980); GODFREY R. DRIVER & JOHN C. MILES, *THE BABYLONIAN LAWS* 76-93 §§ 196, 197, 200, 210, 229, 230 (1935); IMMANUEL KANT, *THE METAPHYSICAL*

Criminal punishment visits an imposition upon the offender, sometimes a very severe imposition. No such imposition could be licensed under a reciprocity principle unless the offense was itself an imposition. The only principles of reciprocity that will pass the test of fairness are principles on which what is reciprocated is sufficiently like what is being reciprocated. It is not unfair to give tit for tat. It *is* unfair to make a serious imposition upon one who seriously imposed upon no one.

The conclusion of the first part of this article is, then, that withholding criminal liability from attempts that impose no risk is supported by the structure of the existing criminal law, by the desideratum of theory completeness in liability ascription, by the logic of criminal responsibility, by the meaning of "attempt," by the importance of liberty and autonomy, by the nonexistence of satisfactory options intermediate between the subjective and imposition theories, and, most importantly, by retributive justice and the fundamental unfairness of imposing so seriously upon one who has not imposed upon society

III. APPLICATION OF THE IMPOSITION THEORY TO IMPOSSIBLE ATTEMPTS: CHARACTERIZING RISK

A. *The Problem*

On the theory of this article an attempt ought only be punishable if it constitutes an imposition. No attempt is an imposition in one straightforward sense. None results in the concrete harm intended.⁷⁰ If unsuccessful attempts are to count as impositions, it must be because they impose *risk* upon some person or group of persons. I understand a possible attempt as one that, if pursued far enough, gives rise to immediate, objective risk. Impossible attempts fail to do so.⁷¹ It is because, and only because, possible attempts impose risk that it is proper to criminalize them.

One way of putting the task that remains, then, is to distinguish possible from impossible attempts in a fashion consonant with the imposition theory of criminal liability. Alternatively stated, it is to give an account of the proper concept of imposed "risk."

This is not a trivial undertaking, but it is a good deal easier than what the accepted tradition must do to distinguish between those attempts that do and do

ELEMENTS OF JUSTICE 101 (John Ladd trans., 1965); ROSS, *supra* note 65, at 16-47, 56-64.

⁷⁰ Put aside the fact that most convictions for attempts occur in cases in which the crime was in fact completed, but the defendant plea bargained down to the attempt charge.

⁷¹ There may well be senses of the word "possible" that are not congruent with my distinction which is intended to provide a theoretically sound reconstruction of the notion of an "impossible criminal attempt."

not give rise to liability. Partisans of that tradition who do any hard thinking on the issues soon find themselves enmeshed in a web of distinctions involving factual impossibility, legal impossibility, mixed impossibility, reasonable beliefs, unreasonable beliefs, highly unreasonable beliefs, and often divisions and subdivisions within these categories. The most insightful accounts of this exercise in drawing and rationalizing distinctions, demonstrate just how difficult an enterprise it is.⁷² Fact situations slip with protean ease from one category to another depending upon how the attempt is described. The ensuing complexity, and I would say confusion, are largely the result of the fact that most people would respond to hypothetical cases with a compromise between the subjective and imposition theories. As we have seen, however, there is no intellectually sound compromise.

On the imposition theory, these traditional distinctions are unnecessary. We need ask only if there is an imposition of risk, under the appropriate concept of risk. For example, even before we begin our examination of the notion of risk, it will, I hope, be plausible that the purchase of nonstolen goods imposes no concrete and immediate risk upon anyone, even if the purchaser believes them to have been stolen.

In certain sorts of cases it is not necessary to do any considerable analysis of the concept of risk appropriate to the imposition theory. These are attempts whose impossibility turns on the absence of any suitable candidate victim, upon whom the risk, however characterized, might be said to be imposed. Consider the malevolent hunter who, deep in the wilderness, sees a tree stump of human shape, believes that it is a human being, a stranger to her, and fires at it. Because there is no person that she intended to shoot, there is no one about whom the question can even be asked whether he was put at risk. There is a fortiori no imposition upon anyone; no violation of anyone's rights.

Things are not, however, always this easy for the imposition theory. In cases with identifiable intended victims, the theory must provide a suitable account of immediate risk so that it may be determined whether any such risk was imposed on the intended victims. Just what concept of risk is it that is suitable to this task? First, it follows from the logic of the imposition theory that the appropriate concept of risk must be objective. It cannot be risk from the point of view of the actor, else voodoo pin sticking would count as imposing risk.

But is there such a thing as objective risk? Lawyers and those schooled in the social sciences are, I think, typically skeptical of the idea of objective risks or probabilities. Their paradigm is that something is more or less probable to a

⁷² See Fletcher, *supra* note 12; Graham Hughes, *One Further Footnote on Attempting the Impossible*, 42 N.Y.U. L. REV. 1005 (1967); Kenneth W. Simons, *Mistake and Impossibility, Law and Fact, and Culpability: A Speculative Essay*, 81 J. CRIM. L. & CRIMINOLOGY 447 (1990).

particular person on given evidence. One need not, however, deny that there are subjective and other epistemic notions of probability and risk, useful in many settings, to assert that there are also objective probabilities and risks. The curve of a newly built road may be dangerous even though no one has yet recognized it and the statistics that will evidence its danger lie some distance in the future.⁷³ A given gambling die may be a fair die, in that the probability of any face turning up on a vigorous role is very close to one in six, even if the die has never been and never will be rolled. There are large areas of legal doctrine that are utterly dependent upon the concept of objective risk—products liability to name only one of the more obvious. In fact, a little reflection shows that the notions of negligence and recklessness cannot be understood without reference to an objective concept of risk.

I could, at this point, bring this article to a close by appropriating the concept of risk under which tortiously negligent acts are said to impose risk.⁷⁴ If the concept is sufficient to support a theory of tort law, then it should also be enough to make respectable the imposition theory's account of attempts. I shall not take this easy way out for two reasons. First, there are some genuine puzzles about the application of the concept of objective risk to attempts that require a solution before I would expect the reader to accept that I can distinguish between possible and impossible attempts in the way that I purport to do. Second, I need a finer-grained account of risk before I can say in a number of hard cases whether there ought to be criminal liability

To start into the analysis of the appropriate concept of risk, let me indulge for a moment in the very large assumption that the world is physically deterministic. This assumption is designed to make the going difficult for an objective sense of risk. On this assumption, the bullet that misses the victim's head by an inch imposed no risk in the fundamental physical sense. From no prior state of the world was it physically possible in this sense that the bullet would strike the victim. Given determinism, what fails to happen is impossible in the sense of possibility defined in terms of what is permitted under physical law from actual state descriptions.

Now, I neither know whether physical determinism is true, nor if false how much play there is in the laws of nature. A good current guess might be that the world is not deterministic, but that for macro-level phenomena there is little or no room for physically possible events that do not occur. Thus the probability in the fundamental physical sense of the close miss bullet's hitting may be zero, on fundamental physical probabilities, even if determinism is false.⁷⁵ What this shows is the prudence, if not the necessity, of defining

⁷³ Of course those future statistics cannot be what it is for the curve to be dangerous, because the curve might be fixed before the statistics would have started coming in.

⁷⁴ See, e.g., George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972).

⁷⁵ See FLETCHER, *supra* note 9, at 80–81.

objective risk for criminal liability purposes independently of that paradigm of objectivity—fundamental physical probabilities.

B. *The Ideal Observer*

As just discussed, we can define risk neither in terms of the subjective expectations of the attemptor, nor in terms of fundamental physical probability. How, then, are we to define it? I agree with Fletcher⁷⁶ that it is helpful in working out the definition to make use of the services of an idealized observer. This observer is distantly related to the Reasonably Prudent Person of tort law and to the Ideal Observers of certain moral theories.⁷⁷ My claim is that if an action would seem to impose a risk to a suitably characterized observer, then the associated attempt is a possible attempt for the purposes of the criminal law (The observer is really a metaphor for the evaluation of the probability threshold and for a particular construction of a state description.)

The characterization of the observer involves specifying what question the observer is to answer, what knowledge she has, from what vantage points she makes her observations, and what observational aids she has at her disposal.

First, what question is the observer to answer? The unanalyzed question is: "Did this attempt impose a risk (of the sort intended by the actor) on anyone?" Let us try to flesh this out in frequency terms: "If this attempt were repeated 1000 times in such and such fashion would it result in the concrete harm intended by the agent at least once?" The "such and such fashion" is the observer's description of the act, as derived from her observation. I will call this a description of the "conditions of repetition" under which the probability is to be generated.

The 1000 to 1 probability ratio is obviously arbitrary, but something of the sort is needed, as the following hypothetical will show. Suppose that Janis puts on a ghastly mask and runs yelling at people on the street. Being a bad sort, she does so with the hope and purpose of causing death by fright. In fact, one in every 25 million potential victims would have a fatal heart attack if exposed to Janis' conduct. Put aside what Janis should be charged with if she happens to succeed or if she knows that she has a particularly susceptible victim. Also put aside such lesser charges as harassment or menacing that Janis may be guilty of in typical cases by causing some mild consternation. Janis would not, in the typical case, be guilty of attempted murder. There is some risk, but the risk is too low for the law of homicide to take cognisance of it.

⁷⁶ Fletcher, *supra* note 12, at 65. I will fill in answers to some questions Fletcher left open about the ideal observer, although no doubt in a somewhat different way than Fletcher would.

⁷⁷ JAMES S.C. REID, *LAW AND THE REASONABLE MAN* (1968); Roderick Firth, *Ethical Absolutism and the Ideal Observer*, 12 *PHIL. & PHENOMENOLOGICAL RESEARCH* 317 (1952); Elmo Schwab, *The Quest for the Reasonable Man*, 45 *TEX. B.J.* 178 (1982).

Exactly how much risk in quantitative terms is enough, is a function of the seriousness of the concrete harm intended. The law does, and ought, look the other way for higher risks if the harm intended is minor than if death is intended. Thus the ratio aspect of the question for the observer should be phrased: "If the conduct is repeated n times would it give rise to a concrete harm at least once?" where n is set by the substantive criminal law for each primary offense.

With respect to her knowledge base, our observer ought be armed with our best current physical theories, including the relevant branches of engineering. It would err on the side of subjectivism to adopt the agent's physical theory. It would be unfair to make the agent criminally liable on the grounds that his act was risky on a discarded theory if not risky on our best current theory.

For similar reasons, the observer should be thought of as making her observations at all relevant points along the line of the transaction up to the last act of the agent. She has all the information that the agent has, but lacks his misinformation.

Obviously, however, the observer cannot be omniscient. Omniscience would, again, risk reducing all probabilities to, or close to, 0 and 1. The chief limitation on the observer is that she ought not to be thought of as having instruments to boost her powers of observation. She has no microscope, no instruments of chemical analysis, no transit, no x-ray, no wind gauge. She is, like the reasonable person of tort law, very much a macro-level creature—able to observe those things that ordinary people can observe if in the right place.

Although it introduces some complexities, the observer should be permitted to describe the conditions of repetition to include the intent of the actor to the extent that such intent will be inferable by the jury either from the nature of the action or from defendant's statements or other ancillary evidence. Thus it would be a proper description that the actor was "shooting at the victim's head or upper body" from such and such position. The observer would not be restricted to a description of the angle of the gun barrel.

This "shooting at" element of intent is, after all, a determination that the jury must make, in any event, in order to convict. By including it in the description of the conditions of repetition we avoid the unintuitive result of an acquittal in the case that the actor, though trying his best, was such a poor shot that the observer could see immediately that the shot would miss. Such a shot, described even in macro-level detail, would give rise to conditions of repetition under which every retrial would miss. If our actor, however, were given several chances to shoot at the victim from where he was standing, he would succeed on some of them.

Does including this intent element in the description of the conditions of repetition place us on a slippery slope at the bottom of which is the voodoo pin sticker? Having permitted a component of the actor's intentions into the description, have we a principled basis for refusing to accept the description,

"trying to kill the victim"? If the pin sticker is bound only by *that* repetition description, we presumably sooner or later wind up with a corpse.

We need not, however, take one more step down the slope than supplies us with acceptable conclusions. The principle that stops the descent is the guiding idea that an attempt must be an imposition. To determine if an act constitutes an imposition of risk, we need a fairly detailed description of the act. The description, "trying to kill," without more, is not a candidate. We get a better, not a worse, description for the purpose of assessing risk, if we include "shooting at" as part of the description. But to omit such details as where the assailant was standing and what weapon he was using would degrade the description for the purposes of risk assessment. Therefore we decline to take *those* steps down the slope.

For the observer to include any intent element, even a thin one, in her repetition description, will conflict with some judicial enforcement of the rule that non-experts should testify as to "facts" not "inferences." Despite the counsel of the authorities,⁷⁸ some judges will sustain an objection to a witness statement that the defendant was "shooting at the victim." Preferring the witness to say that "the pistol was pointed in the direction of the victim." Similarly, there is a preference for seeing pale, shaking victims, rather than frightened victims. The judges are wrong on that point, however. Psychology and phenomenology, as well as one's own experience, teach that human beings often see (are immediately aware without conscious inference) people shooting at each other, just as they see angry people and fearful people.⁷⁹ They are often quite unable to describe all the features of the person observed that were involved in their seeing the person as fearful or as shooting at the victim.

Let us take a further look at the conditions of repetition through characteristics of the observer. By virtue of observing every relevant temporal stage of the transaction, the observer will see the sugar going into the rat poison box, even if this occurs months or years before powder from that box is put in a teacup. Because of her lack of instruments to perform a chemical analysis, however, the observer will not pick up the fact that a poison was mixed in very slightly incorrect proportions. If the poison will fail or the victim will survive being pushed from the window for reasons of physiology that go beyond gross observations of age, size, and the like, the observer will not include such details in the conditions of repetition. She will generate her risk statistics by assuming a statistically fair sample of people with the observable macro features of the victim.

⁷⁸ CHARLES T. MCCORMICK, MCCORMICK ON EVIDENCE 23-24 (1972); JOHN H. WIGMORE, 7 WIGMORE ON EVIDENCE § 1919 (1985).

⁷⁹ See generally NORWOOD RUSSELL HANSON, PATTERNS OF DISCOVERY 1-30 (1958); WOLFGANG KOHLER, GESTALT PSYCHOLOGY (1929).

Observers akin to the Reasonable Person are rarely sketched in quite this detail.⁸⁰ Once the sketch is attempted, it is likely to appear a little arbitrary at points. From a metaphysical point of view it is arbitrary. Bear in mind, however, that the characteristics of the present ideal observer are not driven by metaphysics or epistemology. They are instead the reflection of normative concerns inherent in criminal law theory. The idea is to come up with an observer whose pronouncements will correspond to our intuitions about the sorts of states of affairs that ought to be taken to be criminally punishable risks.

The restriction of the observer to the macro-level and the inclusion of thin intent descriptions, such as "shooting at," serve the intuitions that criminal liability ought to arise from the bullet that comes close to the head and the poison, the stab, or the fall that would kill some people who look very like the victim.

There is also a theoretical justification for structuring the observer as described. Because human beings, for almost their entire history as a species, have been restricted to the macro level, and because most of us spend most of our time operating at the macro level, our moral and legal principles are geared to the macro level. In addition we *see* people point pistols at others' heads. Such "pre-interpreted" perception is, again, part of the ordinary world for ordinary people. It is the stuff from which both morality and law emerge.

For similar reasons, an analysis of the notion of objective probability for gambling devices properly takes place at the macro-level. An exceptionally exacting micro-analysis might determine that the probability of a 7 on a particular play of a roulette wheel was 1, whereas the sort of macro-level analysis appropriate to a gaming commission investigator would find the probability of a 7 to be 1/32. We gamble at the macro-level. Macro-level fairness is compatible with micro-level predictability. We assess risk for moral and legal purposes at the macro-level. Macro-level risk is compatible with a micro-level predictability of no injury.

C. Some Applications

A certain set of stock hypotheticals turn up in nearly every discussion of criminal attempts. I will run my ideal observer through some of these cases to illustrate the way I distinguish between possible and impossible attempts, and to show when certain other theories go wrong. I do not expect immediate agreement with my own conclusions on each of these hypotheticals. Intuitions

⁸⁰ See M. Naeem Rauf, *The Reasonable Man Test in the Defence of Provocation: What Are the Reasonable Man's Attributes and Should the Test be Abolished?*, 30 CRIM. L. Q. 73 (1987); see e.g., Dolores Donovan & Stephanie Wildman, *Is the Reasonable Man Obsolete? A Critical Perspective on Self-Defense and Provocation*, 14 LOY. L.A. L. REV. 435 (1981); Steven Shavell, *Deterrence and the Punishment of Attempts*, 19 J. OF LEGAL STUDIES 435 (1990).

are very mixed on these cases. Indeed, as I have suggested, I believe that most commentators have inconsistent intuitions across the range of standard cases. The root of the inconsistency is an attempt to combine the uncombinable—the pure subjective and pure imposition theories. As the reader subjects her intuitions and theory to critical examination, I would expect an increasing level of agreement on the hypotheticals.

It is a theorem of the imposition theory that if something is absent that is necessary for the imposition of risk, then there is no punishable attempt. Among the necessary items that may be missing are operable guns, poisons, stolen goods, controlled substances, dutiable imports, and victims. In each case the actor has good reason to believe that the item is present. Because he has such good reason, he is revealed to be just as dangerous and wicked a person as if it were present, and for this subjective theories find him liable. Depending on the case, theories advertised as antisubjective may find him liable as well.⁸¹ The imposition theory will generally find no liability, unless the essential item is “missing” only in an undetectable way

I will first consider missing victim cases, divided into two subgroups. In the first, there is no potential living victim at all. In the second, there is an identifiable victim, but one who is arguably out of harm’s way

1. *No Victim Cases*

It is at the heart of the imposition theory that there is no crime unless someone’s rights have been violated. It follows that in any case in which there is no appropriate victim, there can be no liability. This principle sometimes can, and must, be applied without employing the ideal observer device.

Consider, for example, two cases on which the present account conflicts with that of Fletcher. Fletcher would find attempted rape if the apparent victim were in fact dead or if the apparent victim consented.⁸² The dead victim case is a particularly dramatic example of a victimless prosecution of a crime that requires a victim. It is, again, as if a hunter with a homicidal streak shot at a stump in the belief that it was a human being, but without any idea who it might be. There is no particular individual who is even a candidate to have had his or her rights violated by his action. It cannot be presented as a risk to anyone in particular in even the most extended sense of risk.

In the dead victim case, the offender has attempted to commit a rape within the ordinary language meaning of “attempt.” However, the attempted rape of a corpse is not “an objectively dangerous act that treads upon the rights of

⁸¹ See, e.g., GROSS, *supra* note 12, at 209.

⁸² Fletcher, *supra* note 12, at 63.

others.”⁸³ That is, it does not tread on such rights by creating a danger of rape, for there was no one faced with such a danger.⁸⁴

I do not doubt that sexual relations with a corpse can be criminalized, and that such criminalization may be in part justified by an interest of the deceased in the integrity of her body, which interest survives her death. I would also grant that a belief that the victim was alive ought not to be a defense to the offense of necrophilia. This, however, is not a matter of the logic of attempts, but is simply an instance of the principle that it is no defense that one intended a greater harm.⁸⁵

The non-apparent consent case in its purest form raises similar issues. Suppose that the apparent victim of a rape had written two days previously to the defendant. She expressed an unconditional consent to sexual intercourse with him, but warned him that she would feign considerable resistance, as a matter of her own preference. The letter was delivered a day too late. The apparent victim, however, remained true to her unread declaration, her resistance was realistic, but entirely play acting.

In this case, presumably, the apparent victim would testify for the prosecution only under subpoena. She would maintain that there was not and could not logically have been any “treading” on her rights. Her testimony would, however, convict the defendant of attempt under the Model Penal Code.⁸⁶ That Fletcher would agree, shows how far his subjectivist “bespeaking criminality” dominates his nascent imposition theory, stated in terms of the objective danger of a rights violation.⁸⁷

2. *Victims in Places of Safety*

In many standard hypotheticals, there is an identifiable intended victim, and the question becomes whether the offender’s action generated a risk that violated the rights of that intended victim in the appropriate way. For this analysis the ideal observer is called to work.

Gross, though a self-professed member of the “objective” camp, understands there to be a “true threat of harm” when the actor shoots into a bed late at night, not knowing that its usual occupant is a thousand miles

⁸³ *Id.*

⁸⁴ Because there was no one who could have been faced with any risk of rape, there is no place for application of the ideal observer heuristic, the point of which is to assess objective risk. It is, therefore, not a counterexample to the present theory that it might require a microscopic examination to determine whether a victim was dead or alive. If the victim is dead, however difficult that may be to determine, she is not at risk for invasion of rights that one has only when alive.

⁸⁵ See LAFAVE & SCOTT, *supra* note 4, at 222.

⁸⁶ MODEL PENAL CODE § 5.01(1)(a) (1985).

⁸⁷ See *supra* notes 12–17 and accompanying text.

away⁸⁸ I am tempted to wonder whether, with objectivists like this, there is any need for subjectivists. My ideal observer, in any event, would know that the intended victim was well out of harm's way, and that no immediate and concrete risk could possibly have been imposed upon him.

The situation becomes more puzzling if the shooter is chasing the victim through the woods, temporarily loses sight of him, then makes out four roughly humanoid shapes in the gathering dusk. One of them is in fact the victim. Another is a tree stump, and it is at the latter that the shot is fired. This is parallel to an example Gross suggests of an actor who, intent on stealing one of ten umbrellas in a pile, happens to take the one that she owns.⁸⁹ Certainly in the latter case and probably in the former, it is fair to say that there was an immediately present concrete risk of the substantive crime of theft or homicide, respectively. The ideal observer should delineate the conditions of repetition in the umbrella case as she would a case in which the actor draws a number out of a hat. (As a practical matter, in some such cases the ideal observer could only arrive at conditions of repetition of this sort on the basis of a confession.)

When the shooter might just as well have shot at the victim as the stump, there ought to be liability. When the victim is secreted behind a rock, there ought not be. What if the intended victim is in fact within the range of a shot from where the shooter stands, but is so positioned as to seem part of a tree, while the stump could easily be mistaken to be a human being? Presumably the shooter will aim at the stump. The ideal observer, then, should include in her conditions of repetition some such description as "shooting at apparently human shapes." Then there should be liability only if the victim is among the apparently human shapes from the shooter's perspective.

3. *Defective Means Cases*

The victim may not be in a safe place, but nonetheless may be safe because the actor selected a defective means. Consider, again, the would-be poisoner who adds to his aunt's tea a healthy tablespoon of white powder taken from a freshly opened box labeled "Arsenic—Rat Poison." It happens that the box contains only sugar, which by way of explanation is used to cut the arsenic in the rat poison plant. A worker set a control to the wrong position. This box of "rat poison" then creates no actual physical risk. The would-be poisoner could shovel as much the contents of this box into the aunt's tea as he could get away with, without her ever being at all at risk. The ideal observer, knowing the history of the box, would know this, which is to say that the conditions of repetition would be limited to boxes containing sugar. Because there is no imposition of risk, there is no attempt.

⁸⁸ GROSS, *supra* note 12, at 216.

⁸⁹ *Id.* at 205.

Here Gross would, I think, again side with the subjectivists. He would admit that there is no risk in the specific physical situation, but would say that there is here a "threat of actual harm" because such harm is "expectable" on the defendant's conduct. Its expectability, in turn, is premised on the defendant's having a reason to believe that the harm will occur.⁹⁰ Here, of course, the would-be poisoner has quite a good reason indeed to believe that the powder is arsenic.

In short, Gross would argue for a broader set of conditions of repetition. The poisoner would spoon out powder from a wide sample of "rat poison" boxes superficially identical to the box in question. My conditions of repetition are limited to the particular box. On most of his repetitions the aunt ends up dead; on mine she suffers a slight sugar high.

How do we decide which conditions of repetition are the appropriate ones? It is a matter of the normative theory of attempt liability. The broader set of repetition conditions is the correct one to use if one's concern is the evaluation of the character of the actor. Suppose, however, that one believes, for the reasons advanced in the first part of this Article, that an actor may be as depraved or dangerous as you like, but will not be criminally liable unless he imposes upon someone. The crucial question then becomes whether the aunt's rights were violated.⁹¹

It would, of course, be too thin a conception of the aunt's rights to take them to be violated only if she is physically harmed. The intentional creation of a physically dangerous situation that she happens to survive unscathed ought to count as an invasion of her rights. But this consideration will not take us beyond present physical risk. That is why the imposition theory would limit the conditions of repetition as outlined. This is not because there is no respectable sense of "risk" corresponding to a wider set of repetition conditions, but because such senses of "risk" are of interest only for purposes that ought to be irrelevant for criminal liability.

The restriction to the macro level is what insures a set of conditions of repetition such that pushing the victim out of a third story window will result in a potential attempted murder charge, as will administering a jolt of electricity which would not, in fact, ever be enough to kill the actual victim. It is sufficient if such a jolt would sometimes kill others who outwardly resemble the victim. For similar reasons, although a woman cannot be liable for attempted rape as a principal, an impotent man can be.⁹²

⁹⁰ *Id.* at 226.

⁹¹ Fletcher reaches the conclusion that the description should be narrow in service of "liberal concerns for protecting privacy." GROSS, *supra* note 12, at 66. Privacy is part and parcel of the autonomy concerns I discuss above. The other arguments of the first part of this article substantially buttress the conclusion.

⁹² See *Preddy v. Commonwealth*, 36 S.E.2d 549 (Va. 1946) (conviction of impotent man for attempted rape upheld).

Most defective weapons will not give rise to liability. The exception would be those weapons that one could not tell would fail even had one watched the construction and subsequent history of the weapon. Defective bullets, so far as I know, typically fall into this exception.

In the case of Fletcher's invisible shield between shooter and victim⁹³ there will be no liability, assuming that the shield could be discovered by macro-level observations. Fletcher would find liability in this case, which seems odd from an objective standpoint. After all, the victim is at no greater risk than if he were not on the other side of the shield at all, but instead a three dimensional likeness were projected on the shield.

We would get a different result if instead of a shield, extraterrestrials were, undetectably, standing by ready to vaporize any bullet that would otherwise strike the victim. Suppose with such extraterrestrials on guard, a bullet just missed the victim's head. Because advanced extraterrestrial technology detected that it would miss, the bullet was left to its course. There was, however, in one sense no risk to the victim. Had the bullet been on target, it would have been harmlessly vaporized. My ideal observer, limited to the macro level, will fail to capture this sort of risk. This "failure" is all to the good. Potential interferences of this undetectable and wholly extraordinary sort take us too far away from the common sense world in which criminal liability operates. There was here risk as we understand risk. We should no more withdraw that judgment upon hearing extraterrestrial testimony than we should were a physicist to say that there was no risk because of the precise angle at which the pistol was held.

4. *Noncontraband Cases*

My ideal observer would know the history of goods purchased by a fence. Thus when the goods were not stolen, the conditions of repetition would include only nonstolen goods. There is then neither a receiving of stolen goods nor any objective risk thereof. I, therefore, would endorse the result in *People v. Jaffe*, for this more fundamental reason, as well as for the reason that the purchase was not an ordinary language "attempt."⁹⁴

Gross argues that whether this is the correct outcome depends upon legislative intent. A certain legislative perspective in criminalizing the receipt of stolen goods would entail, he maintains, attempt liability even if the goods are not stolen.

⁹³ Fletcher, *supra* note 12, at 58.

⁹⁴ *People v. Jaffe*, 78 N.E. 169 (N.Y. 1906); see *supra* notes 33-39 and accompanying text.

If the business practices of receivers of stolen goods were deemed in themselves a threat of harm to be dealt with criminally, then whether or not goods received were in fact stolen would not matter for attempt liability, so long as the goods were being *received as stolen goods*.⁹⁵

I agree that some of the business practices of fences could be made criminal. Perhaps purchasing goods without proper documentation is such a practice. If this is the legislative intent, it could and should be turned into explicit statutory language. It is hard to see, however, how this could be a fair reading of a statute that nominally criminalizes something completely different—the receipt of stolen property. Moreover, if it were the intent of the legislature that receiving goods without proper documentation be criminal, and if that were a fair interpretation of the statutory language, then such conduct should be prosecutable as the substantive offense itself, rather than simply its attempt. It will not do to say that the statute criminalizes one thing and that an attempt at it criminalizes something utterly different.

Of course I do not deny that a state could add to its jurisprudence the principle that one who buys goods in the belief that they are stolen is to be liable for attempted receipt of stolen goods. Subjectivist principles can be imposed by brute legislative force, so to speak, as actually happened in New York in the legislative overruling of *Jaffe*.⁹⁶ The Model Penal Code goes quite out of its way to mandate a subjective theory of attempts.⁹⁷ Such legislation is unjust, but not unconstitutional. In any event, I doubt that such subjectivist direction can ever be fairly found to be implicit in the elements of such substantive offenses as receipt of stolen property.

These considerations apply directly to cases of attempts to smuggle nondutiable lace and attempts to possess a substance that is not in fact controlled. It makes no difference from the point of view of the imposition theory whether the defendant's mistake was about the contents of the customs or controlled substance list or the history or chemical properties of the items in question. There is no immediate risk of anything that the law forbids, and hence no offense.

There is no attempt to sell a controlled substance if what is sold is not a controlled substance. The imposition theory would not, however, find objectionable a crime defined as selling a purported controlled substance. There would be a violation of such a statute whether or not the substance was actually controlled, and whether or not the seller knew its true nature. The only requirement would be that the seller held it out as a substance that is controlled. The reason that this is a permissible offense is that something is imposed upon

⁹⁵ GROSS, *supra* note 12, at 202.

⁹⁶ See N.Y. PENAL LAW § 110.10 (McKinney 1987).

⁹⁷ MODEL PENAL CODE § 5.01(1)(a) (1985).

the buyer whether the substance is controlled or not: the dangers of the controlled substance or a sale on materially false information.

IV CONCLUSION

My purpose in this article has been to argue for an imposition theory of criminal liability. The theory does not deny that mental culpability has a role in criminal liability. What sets the theory of this article apart is its insistence that an imposition that violates the rights of some person or persons is a necessary condition for any proper ascription of criminal liability. This thesis has implications throughout the criminal law. I have focused here on criminal attempts, because attempts, and particularly harmless attempts, are an ideal test case for the imposition theory. It is a corollary of the theory that impossible attempts and most interrupted attempts, because they impose no immediate objective risk, ought not be subject to criminal liability.

There may sometimes be crime control advantages to punishing interrupted and impossible attempts. We should, however, forego those advantages for reasons that go deep into the conception of a just and free society. Most fundamentally, society lacks any moral license to impose a criminal sanction upon anyone who has not herself imposed by violating the rights of some other person or persons. Second, a society with proper respect for liberty and autonomy will not bring the heavy hand of the criminal law down at any earlier stage than necessary in the chain of steps leading towards the final harm.

It is at this point that commentators have tried to work a balance of security and liberty interests by compromising between the pure subjective and pure imposition theories. This Article argues that any such compromise is intellectually unstable. In the end, one must either embrace the imposition theory or be prepared, in principle, to embrace the findings of a machine that measures mental depravity or predicts future dangerousness.

The traditional criminal law was systematically sensitive to the values of retributive justice and autonomy for which the subjective theories have so little regard. It is precisely these vital values that the "modern" commentators want to see "reformed" out of the criminal law. These reforms are not mere fine tuning. Subjectivism's conflict with the body of criminal law is thorough, deep, and a matter of principle, not detail. Indeed, reflection on the conflict between subjectivism and the concept of criminal responsibility will show that a consistently subjectivist theory of crime control would not be a system of criminal justice at all, but rather social therapy or preventive detention and supervision. It might be convenient, but it would be unjust. Subjectivism's injustice is further manifest in its violation of legality stemming from its bending of language, its inherent vagueness, and its radical incompleteness.

Having concluded that there ought be no liability for attempts absent the imposition of an immediate objective risk, it remained to specify objective risk.

This I did in the second part of the Article, first through the principle that there is no risk absent someone who is potentially at risk, and second through the services of an ideal observer. The ideal observer is a method of specifying the conditions of repetition that would ideally be used to generate the risk "statistics." The ideal observer is omnipresent up to the act in question, has access to any post-act statements available to the jury, but is limited to observations at the macro-level. An observer so characterized will define a notion of risk appropriate to an imposition theory, as risk of imposition ought to be understood in criminal practice.

The resulting theory is both simpler in application than more subjective theories, and, more importantly, gets the cases right. That it gets the cases right may not be obvious at first. It will become clearer if you confront and revise your own initial intuitions on the cases in terms of your normative theory of criminal liability, while holding that theory subject to simultaneous review and revision in the light of the arguments of this Article.⁹⁸

⁹⁸ RAWLS, *supra* note 61, at 20–21, 48–51.